LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LYMAN C. CONGER
EDWARD J. HAMMER
Kohler, Wisconsin

ELLISON D. SMITH, JR.
610 Barringer Building
Columbia, South Carolina

E. RILEY CASEY
Counihan, Casey & Loomis
1000 Connecticut Avenue
Washington 36, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement of the Case	3
Proceedings Below	
A. The Board's Original Decision	6
B. The Review and Remand	6
C. Prior Petition for Certiorari	12
D. The Board's Supplemental Decision	12
E. Petition for Review of Board's Supplemental Decision	14
The Importance of the Case	14
Conflict With the Act, With Decisions of This Court and With Other Courts of Appeals	18
A. Conflicts as to Findings Re Discharges	18
(1) Conflict With the Act	18
(2) Conflict With This Court	19
(3) Conflict With Other Circuits	19
(4) Conflicting Interpretations of the Thayer Case	20
(5) Conflict in the Decisions of the D. C. Circuit	21
B. Conflicts as to Finding of Refusal to Bargain	21

Page

Reasons for Granting the Writ 24

A. Salient Undeniable Facts 24

B. The Board Has No Authority to Establish National Labor Policy—It May Not Do So Even at the Direction of a Court of Appeals 25

C. The Board's Decision Does Not Effectuate But Defeats the Policies of the Act 27

D. The Board Exceeded Its Authority in Ordering the Reinstatement of Individuals Discharged for Cause 30

E. The Board's Decision Ignores the Rights Granted to Employees by the Act 34

Conclusion 36

APPENDIX A:

Decision of United States Court of Appeals for the District of Columbia Circuit—dated April 20, 1965 38

APPENDIX B:

Relevant provisions of the National Labor Relations Act, as amended 39

AUTHORITIES CITED

CASES:

American Insurance Co. v. N.L.R.B., 343 U.S. 395 ... 21

American Shipbuilding Corp. v. N.L.R.B., (March 29, 1965—No. 255, Oct. Term 1964), 85 S. Ct. 955 25, 26, 33

Armour v. Wantock, 323 U.S. 126 15

Page

International Ladies G.W.U. v. N.L.R.B., 237 F. 2d 545 (D.C. Cir.) 21
International Longshoremen's and Warehousemen's Union (Sunset Line & Twine Co.), 79 NLRB 1487 36
Longview Furniture Co., 100 NLRB 301 19
Lummus Company v. N.L.R.B., 339 F. 2d 728 (D.C. Cir.) 16
N.L.R.B. v. Blades, 59 LRRM 2210 (8th Cir.) (Not yet reported in Federal Reporter system) 20
N.L.R.B. v. Beatrice Foods Co., 183 F. 2d 727 (10th Cir.) 18
N.L.R.B. v. Brown (March 29, 1965—No. 7, Oct. Term 1964), 85 S. Ct. 980 ..... 25, 26, 27
N.L.R.B. v. Clearfield Cheese Co., 213 F. 2d 70 (3d Cir.) 19
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 19, 27, 28, 33
N.L.R.B. v. Ford Radio & Mica Corp., 258 F. 2d 457 (2d Cir.) 20, 23
N.L.R.B. v. Indiana Desk Co., 149 F. 2d 987 (7th Cir.) 28
N.L.R.B. v. Insulating Fabricators, 338 F. 2d 1002 (5th Cir.) 18
N.L.R.B. v. Insurance Agents Int'l Union, 361 U.S. 477 21
N.L.R.B. v. Jarka Corp., 198 F. 2d 618 (3d Cir.) 18
N.L.R.B. v. Jones & Laughlin S. Corp., 301 U.S. 1 33
N.L.R.B. v. Kobritz, 193 F. 2d 8 (1st Cir.) 18
N.L.R.B. v. Laundry Drivers' Local, 262 F. 2d 617 (9th Cir.) 18
N.L.R.B. v. Longview Furniture Co., 206 F. 2d 274 (4th Cir.) 19
N.L.R.B. v. Southland Mfg. Co., 201 F. 2d 244 (4th Cir.) 18
N.L.R.B. v. Southern Transport, Inc., 343 F. 2d 558 (8th Cir.) 18
N.L.R.B. v. Superex Drugs, Inc., 341 F. 2d 747 (6th Cir.) 18

Page

N.L.R.B. v. Syracuse Color Press, 209 F. 2d 596 (2d Cir.), cert. den. 347 U.S. 966 18
N.L.R.B. v. Thayer Co., 213 F. 2d 748 (1st Cir.), cert. den. 348 U.S. 883 .....6, 14, 15, 16, 20, 21
N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404 17
Oneita Knitting Mills, Inc., 153 NLRB No. 4 28
Rawleigh, W. T., Co. v. N.L.R.B., 190 F. 2d 832 (7th Cir.) 20
Saginaw Furniture Shops v. N.L.R.B., 343 F. 2d 515 (7th Cir.) 18
Thayer, H. N., Co., 115 NLRB 1591 .....15, 20, 21
United Auto Workers v. W.E.R.B., 351 U.S. 266 .....3, 25
United Furniture Workers, etc. v. N.L.R.B., 336 F. 2d 738 (D.C. Cir.) 18
United Mine Workers of America (Blue Ridge Coal Co.), 129 NLRB 146, modified 299 F. 2d 441 (D.C. Cir.) 18, 36
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 ....8, 17

STATUTES:

National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, et seq.)

Section 1 39
Section 7 39
Section 8(b)(1)(A) 40
Section 8(d) 40
Section 10(c) 40
Section 10(e) 40

MISCELLANEOUS:

House Conference Report No. 510 (H.R. 3020), 80th Congress, 1st Session 31, 32, 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Kohler Co., prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit (Judge Miller dissenting) entered in the above entitled case on January 26, 1962, and on April 20, 1965. (This case results from the following cases in the Circuit Court of Appeals: *Local 833, UAW-AFL-CIO International Union, United Automobile, Air-*

craft and Agricultural Implement Workers of America, Petitioner v. *National Labor Relations Board, Respondent, Kohler Co., Intervenor,* No. 15,961; *National Labor Relations Board, Petitioner* v. *Kohler Co., Respondent,* No. 16,031; *Kohler Co., Petitioner* v. *National Labor Relations Board, Respondent,* No. 16,182; and *Kohler Co. Petitioner* v. *National Labor Relations Board, Respondent, Local 833, UAW-AFL-CIO International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Intervenor,* No. 18,961.)

CITATIONS TO OPINIONS BELOW

The January 26, 1962, decision of the Court of Appeals is reported in 300 F. 2d 699.[1] The April 20, 1965, decision is not yet officially reported but is reported in 58 LRRM 2847. It is printed in Appendix A hereto, infra p. 1a.

The original decision of the National Labor Relations Board is reported at 128 NLRB 1062 et seq. and printed in the Joint Appendix[2] at p. 8 et seq. The Board's supplemental decision is reported at 148 NLRB No. 147 and is reproduced at Supp. J.A. 2339 et seq.

JURISDICTION

The judgments of the Court of Appeals were entered on January 26, 1962, and April 20, 1965. The jurisdiction of this Court is invoked under 28 USCA 1254 (1).

---

[1] It is also reproduced in the Supplemental Joint Appendix (hereinafter designated as "Supp. J.A.") at p. 2318 et seq.

[2] Hereinafter referred to as "J.A."

QUESTIONS PRESENTED

1. Did the National Labor Relations Board exceed its authority and the limitations imposed upon it by Section 10 (c) of the Act in holding that strikers discharged for coercive conduct proscribed by the Act were engaged in an unfair labor practice strike and are entitled to reinstatement with back pay; applying a policy of "balancing" the strikers' illegal conduct against the employer's conduct?

2. May a reviewing court, which has no power to substitute its judgment for that of the Board as to inferences to be drawn from the evidence, nevertheless conclude that the Board "improperly ignored the inferences to be drawn" from evidence which the Board considered and found was "amply refuted" by other evidence—and remand the case to the Board with directions to reweigh the evidence?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, et seq.) are set forth in Appendix B hereto.

STATEMENT OF THE CASE

This case involves the discharge of 57 strikers[3] for misconduct already passed upon by this Court. In *U.A.W.* v. *Wisconsin Employment Relations Board,* 351 U.S. 266, 270, this Court said—

---

[3] 90 strikers were discharged for unlawful conduct during the strike. The Board did not proceed on 12. It still sustains the discharge of 17 and finds *de hors* the record, that "it now appears" that three others were deceased at the time of the Board's first decision. (Supp. J.A. 2368, n. 28)

> "It seems agreed, and we think correctly in view of the findings of fact, that the alleged conduct of the union in coercing employees in the exercise of their rights is a violation of § 8 (b) (1) of that Act."[4]

The decisions of the Board itself now establish that the strikers here involved were in fact guilty of the conduct found by this Court to be a violation of 8 (b) (1) of the Act and that the Union, through its strike committee, directed and controlled such activities.

The original Board decision found that these strikers did engage in or directed and controlled mass obstructive picketing having the purpose and effect of banning ingress to and egress from the plant,[5] or the "plainly coercive and intimidatory" home picketing,[6] and that this conduct was the reason for their discharge and not a pretext.[7] The Board's supplemental decision adopts these findings.[8]

By its supplemental decision the Board extends the protection of the Act to strikers found guilty of the following types of unlawful conduct:

(1) Mass "belly to back" picketing by "up to 2,500 pickets", having for its purpose the barring of ingress to and egress from the plant, including the maintenance of a "pass" system under which persons desiring to enter the plant were required to obtain a pass from the Union, which "from

---

[4] The "Act" as referred to herein is the National Labor Relations Act as amended, 29 USC 151 et seq.

[5] 128 NLRB at 1103, 1105, 1107-1108; J.A. 66, 68, 69, 72, 73.

[6] 128 NLRB at 1106; J.A. 70.

[7] 128 NLRB at 1102, n. 63; J.A. 65, n. 63; J.A. 73.

[8] Supp. J.A. 2356.

April 5 until May 28, 1954, except for 3 days early in May" kept the plant "SHUT DOWN LIKE A DRUM",[9] and "halting, encircling, blocking, shouldering and bumping of non-strikers or job applicants."[10]

(2) "Plainly coercive and intimidatory" harassment of non-strikers and their families at their homes by "disgraceful spectacles of mob proportions" with "as many as 400, 500 and even 700 persons assembled", shouting "vile names, insults, derisive epithets, and even threats."[11]

(3) Organization and direction of such unlawful conduct by members of the Union's strike committee.[12]

Although the majority of the lower court and the Board concede that this misconduct was "unprotected action"[13] the Board now holds that this misconduct was not so flagrant as "to warrant depriving them of the protection of the Act.[14]

The Board's excuse for this anomalous result is its attempt to formulate and apply a new national labor policy, i.e., that proscribed conduct becomes protected if committed in connection with an unfair labor practice strike.

Thus this case also involves the question of the validity of the Board's prerequisite finding that the strike here involved was an unfair labor practice strike.

---

[9] 128 NLRB at 1103-1104; J.A. 65-68.

[10] Supp. J.A. 2360.

[11] J.A. 70.

[12] Supp. J.A. 2356.

[13] 300 F. 2d at 703, Supp. J.A. 2322; Supp. J.A. 2356.

[14] Supp. J.A. 2361.

PROCEEDINGS BELOW

A. The Board's Original Decision

The original decision of the Board,[15]

(1) Held that Kohler Co. had not refused to bargain in good faith prior to the strike; that its positions on the bargaining demands of the Union "were supported by legitimate and, in the main, reasonable arguments";[16] and that the strike was "caused by the failure of the parties to reach a contract and was for economic reasons at its inception",[17] hence was not an unfair labor practice strike at its inception;

(2) Sustained the discharge of the strikers here involved.[18]

B. The Review and Remand

On petition for review the Court of Appeals for the District of Columbia Circuit (Judge Miller dissenting) sustained those portions of the Board's decision adverse to Kohler Co. and remanded those portions of the decision favorable to Kohler Co., including the discharges here involved.[19]

The majority of the Court of Appeals held that the Board should have applied what it termed the "Thayer doctrine"[20] and "balanced" the discharged strikers' misconduct against employer unfair labor practices.

---

[15] 128 NLRB 1062 et seq.; J.A. 8 et seq.

[16] 128 NLRB at 1068; J.A. 19.

[17] 128 NLRB at 1077; J.A. 30.

[18] 128 NLRB at 1103-1105, 1108; J.A. 66-69, 71.

[19] 300 F. 2d 699 et seq.; Supp. J.A. 2318 et seq.

[20] *N.L.R.B.* v. *Thayer*, 213 F. 2d 748 (1st Cir.), certiorari denied 348 U.S. 883.

The majority opinion recognized that in the case of most of the discharges no such "balancing" was possible under the Board's original decision. The misconduct for which most of the strikers had been discharged had occurred prior to the date when the Board found that the strike became an unfair labor practice strike[21] and therefore could not have been "provoked" by any later unfair labor practice. Accordingly, the majority clearly implied that the Board reverse its previous finding and find unfair labor practices antedating the misconduct as a prerequisite to the reinstatement of strikers guilty of illegal conduct.[22]

The majority found that the Board had "improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history"[23] They ignored the fact that the Board, in its original decision, stated unequivocally: "In reaching this conclusion the Board is not unmindful of the background evidence" and observed that "Standing alone, the foregoing evidence could well lead to a finding . . . that the Respondent was opposed to bargaining with any but a dominated union . . ."; but found that ". . . such evidence is amply refuted by the undisputed facts concerning the negotiations and the results of the collective bargaining during 1952 and 1953."[24]

It is clear, from the express language of the Board's decision, that it did not "ignore" the pre-1953 labor relations history, or view the 1954 negotiations "in

---

[21] 300 F. 2d at 702, n. 6; Supp. J.A. 2320, n. 6.

[22] 300 F. 2d at 703-704; Supp. J.A. 2323-2324, 2342.

[23] 300 F. 2d at 706; Supp. J.A. 2328.

[24] 128 NLRB at 1065; J.A. 12-13.

isolation",[25] but on the contrary followed the statutory mandate to base its findings "on the record considered as a whole".[26]

That the Board's original decision did not ignore the "pre-1953" labor relations history is further made clear from the dissent of Member Jenkins to the original decision.[27] The Board, in its original decision, cannot be considered to have ignored evidence upon which a vigorous dissent was based.

Member Leedom's dissent to the supplemental decision[28] also makes clear that this evidence was not ignored.

It is obvious that the statement in the Court's majority opinion that the Board "ignored" the "pre-1953" history means simply that the majority of the Court would have drawn a different inference from that evidence than that which the Board did draw.[29]

This case poses squarely the question of whether the rule that a reviewing court may not ". . . displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*",[30] may be nullified by the device of stating that

---

[25] 300 F. 2d at 706; Supp. J.A. 2328.

[26] Act, Sec. 10(e); 29 USC 160 (e).

[27] 128 NLRB at 1115 et seq.; J.A. 83 et seq.

[28] Supp. J.A. 2374.

[29] Judge Miller, dissenting, found the grounds upon which the Board's original decision found the strike converted to an unfair labor practice strike on June 1, 1954, "rather farfetched, indeed without foundation in reason". (300 F. 2d at 707, 711; Supp. J.A. 2331-2338)

[30] *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488.

the Board "ignored" the evidence upon which the reviewing court would have reached a different conclusion and by remanding the case with implied instructions to draw a different inference from that evidence.

We submit that a court may not recognize this rule when the Board's decision is adverse to an employer and ignore it when the decision is in favor of the employer.

The further question is raised as to whether a reviewing court may remand with implied instructions that the Board ignore evidence which "fairly detracts" from the weight of the "background evidence." [31]

The original Board found that the *foreground* evidence of the *actual negotiations* "amply refuted" the inference which the majority of the court drew from the "background" evidence.

In this case it was the Board (in its original and undirected decision) rather than the majority of the Court that obeyed the statutory mandate to consider the record as a whole.

The Board did not "ignore" but fully considered the Company's pre-strike labor relations history. In accordance with the statutory command it weighed that history in the light of the undenied facts that—

(1) The "pre-1953 labor relations history" found "amply refuted" by the original Board but now relied upon by the majority of the Court and the Board is ancient history, extending as far back as 1933.[32] Subsequent thereto, in 1953,

---

[31] Id.

[32] Supp. J.A. 2343.

Kohler Co. made a contract with this Union, a contract which the Union hailed as a "good" one, and one "we accept with pride."[33]

(2) The parties negotiated to agreement on a subsequent and further wage increase under the wage reopening provision of that contract.[34]

(3) Kohler Co. at all times during the 1954 negotiations had on the table a complete contract proposal which it was ready and willing to sign as a contract,[35] and, after February 25, 1954, also had an alternative proposal to extend the former contract, including the quarterly wage reopening provision, without change.[36]

Therefore, any finding to the effect that Kohler Co. was refusing to enter into a contract is "amply refuted" by "undisputed facts".

The majority of the Court of Appeals further held that the Board was not precluded by Section 10 (c) of the Act from ordering the reinstatement of strikers guilty of misconduct (as the Board's own brief correctly argued)[37] and stated "But in its decision the Board did not mention the 'for cause' provision of Section 10 (c)."[38]

---

[33] 128 NLRB at 1066; J.A. 14.

[34] 128 NLRB at 1066; J.A. 14.

[35] 128 NLRB at 1067; J.A. 15.

[36] 128 NLRB at 1067; J.A. 16.

[37] 300 F. 2d at 704; Supp. J.A. 2325.

[38] 300 F. 2d at 705; Supp. J.A. 2326.

Again the majority ignores the *express language* of the Board's decision, which stated "... all Board members agree that the Respondent did have sufficient cause for discharging ... members of the strike committee."[39]

It baffles the imagination to conceive of a situation where the employer has "sufficient cause" for discharge[40] and yet a discharge for that reason would not be "for cause" under Section 10 (c).

The decision of the majority of the court below seems to be based on the proposition that a Board decision may not be considered to have been founded on the provisions of a statute unless it specifically refers to the statute by *section number,* even though the Board makes the *factual finding* which gives the statute application and couches its finding in the *language of the statute.*

We submit that this is untenable. A reviewing court has no more authority to make a *de novo* finding on the facts giving application to Section 10 (c) than to displace any other factual finding of the Board supported by substantial evidence.

The Board also found that Kohler Co. had "a valid ground" for discharging those who participated in the so-called "home demonstrations".[41]

Certainly a discharge for a "valid ground" or for "sufficient cause" is a discharge "for cause" within the meaning of Section 10 (c).

---

[39] 128 NLRB at 1105; J.A. 69.

[40] 128 NLRB at 1102, n. 63; J.A. 65, n. 63.

[41] 128 NLRB at 1106; J.A. 71.

C. Prior Petition for Certiorari

Kohler Co. petitioned this Court for a writ of certiorari to review the above decision.

Both the Board and the Union opposed the petition on the ground that the petition was premature since the court below had not yet entered a final order but had remanded the case to the Board.[42]

This Court denied certiorari.[43]

A final order has now been entered by the court below and the case is now ripe for review by certiorari.

D. The Board's Supplemental Decision

The supplemental decision of the Board[44] demonstrates that it construed the remand of the Court as instructions to reverse its prior finding that the strike was not an unfair labor practice strike at its inception, and to use such reversal as a basis for ordering reinstatement of strikers discharged for illegal conduct.

The Board said: "However, the Court concluded, in effect, that the grounds on which the Board had found, the strike was not an unfair labor practice strike at its inception were inadequate."[45]

Member Fanning, in his concurring opinion,[46] construed the remand as a direction to the Board "to reconsider its decision" and to "re-evaluate Respondent's

---

[42] Board Brief in Opposition, pp. 15, 20-21; Union Brief in Opposition, pp. 2, 18, 19.

[43] 370 U.S. 911.

[44] Supp. J.A. 2339 et seq.

[45] Supp. J.A. 2341.

[46] Supp. J.A. 2372.

conduct" and stated: "I have reconsidered my earlier decision in accordance with the Court's instruction . . ."

This poses the question of the authority of a reviewing court to find the Board's conclusions on conflicting evidence inadequate", despite the fact that substantial and undenied evidence supports the Board's conclusion.

The nature of the Board's "reconsideration" and its concept of the implied instructions of the Court of Appeals are clearly shown by the statement in the concurring opinion of Member Fanning:

> "These conclusions are inescapable if Respondent's conduct during those negotiations be viewed as the conduct of an employer opposed to bargaining with any but a dominated union . . ."

It is clear that the Board interpreted the remand to require it to start its "reconsideration" by *assuming* that the Company was opposed to bargaining (thus predetermining the Company's guilt) and to cull from the record only those items which gave superficial support to that predetermined conclusion.

On remand, the new Board ignored the "undisputed facts" of the *actual negotiations* found by the former Board and which the former Board held "amply refuted" the conclusions the Board now draws.[47]

Following its interpretation of the remand, the Board:

(1) Reversed the ruling of the prior Board sustaining the discharge of 77 strikers for misconduct and ordered 57 of them reinstated with back pay, and

---

[47] 128 NLRB at 1065; J.A. 13.

(2) Grounded such reversal upon its reversal of the decision of the prior Board and its new finding that the strike was an unfair labor practice strike at its inception.

E. Petition for Review of Board's Supplemental Decision

On petition for review of the Board's supplemental decision the Court of Appeals (Judge Miller again dissenting) held that the Board had "properly applied the principles announced in our initial decision."[48]

Thus this case raises squarely the question whether a reviewing court has authority to remand a case for "further consideration" and to impliedly instruct the Board, upon such "further consideration" to draw the inferences from the evidence that the Court would have drawn had the case been before it *de novo*.

THE IMPORTANCE OF THE CASE

1. This case is the first instance of judicial approval of:

(a) Mass obstructive picketing having the purpose and effect of preventing ingress to and egress from a plant;

(b) Coercive and intimidatory harassment of non-strikers at their homes;

(c) The direction and control of such conduct by union officials. Such illegal conduct has previously been condemned—not ratified.[49]

---

[48] App. A, p. 38.

[49] *N.L.R.B.* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir.), cited by the majority of the court below as authority for a "Thayer doctrine" leading to such result did not approve or ratify such illegal conduct. There was no obstructive picketing in Thayer, ". . . non-striking

We submit that this novel approval of conduct specifically proscribed by the Act, warrants the review of this Court.

2. The effect of the majority decision below is to direct the Board to reverse a policy which it has followed consistently before and since the *Thayer* decision.

On remand in *Thayer* the Board,[50] while accepting the decision as "the law of this case", made it clear that it was not thereby agreeing with "an analytical

---

employees were able to enter and leave the plants without serious incident." (213 F. 2d at 751) and "It is undisputed that those employees who wished to continue working during the strike were able to do so." (213 F. 2d at.756)

In the instant case the Kohler Co. plant was "shut down like a drum" by mass picketing. (128 NLRB at 1103; J.A. 65)

In Thayer "visits" to the homes of non-strikers (much less coercive and intimidatory in numbers and conduct than the "home demonstrations" involved here) were held to be "coercive in nature and calculated to instill fear of physical harm in the non-striker victims" (213 F. 2d at 757) and the participants were denied reinstatement. (*H. N. Thayer Co.*, 115 NLRB 1591 at 1593-1595, 1596)

The language of the Thayer decision must be read in the light of the facts of that case (*Armour* v. *Wantock*, 323 U.S. 126, 132-133) and any "Thayer doctrine" derived therefrom must be consistent with the facts passed upon in that case and the results of that decision.

In his dissent Judge Miller disagreed with the majority interpretation of Thayer and found no such "Thayer doctrine" as applied by the majority. On the contrary, he read Thayer as a "clear statement" that "if there was cause for discharge, the Board could not reinstate". (300 F. 2d at 710-711; Supp. J.A. 2337-2338)

As we show later, other courts of appeals agree with Judge Miller's construction of Thayer and have not interpreted that case to prescribe any such "Thayer doctrine" as applied here.

[50] *H. N. Thayer Co.*, 115 NLRB 1591, 1595.

distinction drawn by the Court in construing the Act, which distinction the Court itself termed 'subtlety'." [51]

The majority opinion of the Court of Appeals in the instant case noted that the Board in its action on the *Thayer* remand had expressed its intention not to follow this *Thayer* dictum and directed the Board to reverse this position.[52]

We submit that this reversal of long standing and correct construction of the Act warrants the review of this Court.

3. The practical *effect* of this decision cannot be disregarded. It *encourages* the very conduct which Congress has expressly *proscribed* in Section 8 (b) (1) and (7) of the Act.

The Board's supplemental decision recognized that the effect of an order of reinstatement is to encourage the misconduct thus ratified.[53]

If this decision is sustained, unions would have every right to advise strikers that they now have a license to engage in illegal conduct whenever the union can claim that an employer has committed an unfair labor practice.

---

[51] The Thayer court (213 F. 2d at 753, n. 8) based this "analytical distinction" on a statement by Professor Cox that "The distinction was overlooked by the House Managers in reporting the Conference Agreement on the Labor-Management Relations Act 1947."

A "subtlety" concededly "overlooked" by Congress affords no proper basis for construing the intent of Congress. "Labor relations are practical matters. They are not finespun legalistic theories." *Lummus Company* v. *N.L.R.B.*, 339 F. 2d 728, 734 (D.C. Cir.)

[52] 300 F. 2d at 703, n. 15; Supp. J.A. 2323, n. 15.

[53] Supp. J.A. 2366.

This decision, which encourages the very conduct that it was the intent of Congress to eliminate, is of obvious importance to the administration of the Act, and, we submit, warrants the review of this Court.

4. It is a novel and dangerous doctrine that illegal violence, coercion and intimidation can be ratified and rewarded with back pay on the ground that it is in retaliation against the conduct of someone else.

This is particularly true when the law provides an adequate legal remedy for any violation by an employer.

The decision in this case establishes "an eye for an eye and a tooth for a tooth" as the law of labor relations.

Such a reversal of the manifest intent of Congress to substitute legal processes for the law of the jungle in labor relations warrants the review of this Court.

5. The limits of permissible review of a Board decision were established by this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488 and *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404.

Following these decisions courts of appeals have uniformly held that they have no power to displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. The appraisal of the weight of the evidence and the choice between inferences which may be drawn from facts open to conflicting inferences are for the Board and are not subject to review. Courts may not substitute their judgment for that of the Board. If there

is substantial evidence on the record as a whole to support the order of the Board it must be enforced.[54]

If the present decision is sustained, a device has been found whereby these thoroughly established rules may be nullified. Reviewing courts may, in practical effect, substitute their judgment for that of the Board, by directing reconsideration and reweighing of the same evidence with implied directions to draw different inferences therefrom.

CONFLICT WITH THE ACT, WITH DECISIONS OF THIS COURT AND WITH OTHER COURTS OF APPEALS

A. Conflicts as to Findings Re Discharges

(1) Conflict with the Act

The decision in this case reverses the national policy laid down by Section 8 (b) (1) (A) of the Act, which specifically outlaws restraint or coercion of employees in the exercise of their rights under Section 7 of the Act, and outlaws such conduct *without exception.*

The Act has been perverted into a *protection* of that which it *specifically prohibits.*

---

[54] *United Furniture Workers, etc.* v. *N.L.R.B.*, 336 F. 2d 738, 742 (D.C. Cir.)
N.L.R.B. v. *Kobritz*, 193 F. 2d 8, 9, 10 (1st Cir.)
N.L.R.B. v. *Syracuse Color Press*, 209 F. 2d 596, 599 (2d Cir.), *cert. denied*, 347 U.S. 966
N.L.R.B. v. *Jarka Corp.*, 198 F. 2d 618, 620 (3d Cir.)
N.L.R.B. v. *Southland Mfg. Co.*, 201 F. 2d 244, 245 (4th Cir.)
N.L.R.B. v. *Insulating Fabricators*, 338 F. 2d 1002 (5th Cir.)
N.L.R.B. v. *Superex Drugs, Inc.*, 341 F. 2d 747, 749 (6th Cir.)
Saginaw Furniture Shops v. *N.L.R.B.*, 343 F. 2d 515, 517 (7th Cir.)
N.L.R.B. v. *Southern Transport, Inc.*, 343 F. 2d 558, 560 (8th Cir.)
N.L.R.B. v. *Laundry Drivers' Local*, 262 F. 2d 617, 619 (9th Cir.)
N.L.R.B. v. *Beatrice Foods Co.*, 185 F. 2d 726, 727 (10th Cir.)

(2) Conflict with This Court

The decision is in irreconciliable conflict with *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

The *Fansteel* case involved an unfair labor practice strike. In that case this Court emphatically rejected the very excuse now relied upon for extending the protection of the Act to illegal conduct, i.e., that the strike was an unfair labor practice saying:

> "To justify such conduct because of the existence of a labor dispute or of an *unfair labor practice* would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." (emphasis supplied) (306 U.S. at 254)

(3) Conflict with Other Circuits

The decision is likewise in conflict with the decisions of courts of appeals for at least three other circuits.

In *N.L.R.B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (3d Cir.) the court sustained the Board's finding that the strike was an unfair labor practice strike,[55] but held that mass picketing which "physically barred all entrances to the plant" was "directly opposed to the force and violence prohibition of the Act" and that the "reinstatement rights" of strikers who engaged therein "were forfeited".[56]

Likewise in *N.L.R.B.* v. *Longview Furniture Co.*, 206 F. 2d 274 (4th Cir.), also an unfair labor practice strike,[57] the court refused to enforce a Board order

---

[55] (Refusal to bargain) (213 F. 2d at 74).

[56] 213 F. 2d at 75.

[57] See *Longview Furniture Co.*, 100 NLRB 301, 304.

which required the reinstatement of strikers guilty of "vulgar, profane and intimidating language towards other employees in an effort to intimidate them" (at p. 275).

Similarly the seventh circuit in *W. T. Rawleigh Co. v. N.L.R.B.*, 190 F. 2d 832, also an unfair labor practice strike,[58] a Board order directing reinstatement and back pay to employees guilty of mass obstructive picketing was vacated by the court.

(4) Conflicting Interpretations of the Thayer Case

The sole basis for the decision of the majority of the court below is its interpretation of the *Thayer* case (213 F. 2d 748) in direct conflict with the interpretation of *Thayer* by the courts of appeals for at least two other circuits.

In *N.L.R.B.* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457, 464 (2d Cir.), the court interpreted *Thayer* as holding:

> "If it was not a protected activity, then it is axiomatic that the employer, regardless of its motivation, may discharge the strikers and the Board is powerless to order reinstatement."[59]

In the recent case of *N.L.R.B.* v. *Blades*,[60] (8th Cir.), the court cites *Thayer* as supporting the principle that:

> "This section [10 (c)] gives the Board affirmative, remedial power only when an unfair labor practice

---

[58] 190 F. 2d at 834.

[59] The Board's supplemental decision in the instant case designates the misconduct of the discharged strikers as "unprotected activities". (Supp. J.A. 2356)

[60] Not yet reported in Federal Reporter system. Reported at 59 LRRM 2210, 51 LC ¶ 19,698, pp. 33, 74.

> has been committed by authorizing its rectification through reinstatement of the affected employees *who have not otherwise been discharged for cause.*" (emphasis supplied)

Thus the appellate courts for the Second and Eighth Circuits, like Judge Miller in his dissenting opinion, construe *Thayer* as a "clear statement that if there was cause for discharge, the Board could not reinstate." (Supp. J.A. 2337)

(5) Conflict in the Decisions of the D. C. Circuit

Finally, the decision of the Court below is in direct conflict with its own prior decision.

In *International Ladies G.W.U.* v. *N.L.R.B.*, 237 F. 2d 545 (D.C. Cir.), a case which involved an unfair labor practice strike,[61] this same Court (both of the majority judges in the instant case participating) held:

> "We agree that the Board has no authority to *compel reinstatement* of employees who directly or indirectly participate in, authorize, or ratify misconduct." (237 F. 2d at 550) (emphasis in original)

In its decision in the instant case the same Court holds that it has the authority to direct the Board to exercise an authority which it has previously declared that the Board does not have.

B. Conflicts as to Finding of Refusal to Bargain

Since the decisions of this Court in *American Insurance Co.* v. *N.L.R.B.*, 343 U.S. 395, 404, and *N.L.R.B.* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 486, it has

[61] 237 F. 2d at 547.

been well established that Section 8 (d) of the Act does not permit the Board to prescribe the substantive terms of a contract under the guise of a finding of lack of good faith bargaining. Failure to agree to a particular contract, contract provision or union economic demands is not a violation of the duty to bargain. An employer can be found guilty of refusal to bargain only if he is unwilling to agree to *any* contract, even on terms acceptable to him.

This decision, finding Kohler Co. guilty of refusal to bargain, is in clear conflict with this well established law. It ignores the undenied facts that:

(1) The Company made a contract with the Union, which the Union characterized as a "good" one and one "we accept with pride".

(2) That upon the expiration of that contract the Company offered to renew the contract without change.

(3) That the Company made an alternative offer of a new contract, including a wage increase, and was at all times willing to execute such a contract or to renew the former contract.

(4) That the Company never refused to negotiate but on the contrary supported its bargaining positions "by legitimate and, in the main, reasonable arguments".[62]

(5) That the Union publicly stated its reasons for striking and continuing on strike as:

Seniority
Arbitration

---

[62] 128 NLRB at 1069; J.A. 19.

Automatic Wage Progression
Pension
Insurance
Union Security
Wages and Inequities[63]

all subjects of mandatory bargaining on which the Company was not required to agree to any specific proposal.[64]

The Union *never* stated that it was striking for any of the causes now found by the Board as reasons for the strike.

The Board exceeds its authority as defined in the Act and the decisions of this Court when it:

(1) Finds that the Company was refusing to bargain when it was at all times offering to make a contract;

(2) Ignores the reasons understood by both parties to have caused the strike and finds the strike caused and continued for *entirely different reasons*—a casual relationship never stated or perceived by *either* party to the negotiations.

An employer cannot be placed in the position of having to guess at his peril the purpose behind a strike nor be held guilty of refusal to bargain because he was subsequently outguessed by the trial examiner in divining the true purpose behind a strike. ***N.L.R.B.*** v. ***Ford***

---

[63] J.A. 2203-2205.

[64] As Judge Miller in his dissent observed, the original Board found the strike caused "by a disagreement over contract terms" (300 F. 2d at 711; Supp. J.A. 2338). This disagreement continued throughout the strike and continued to be the cause of the strike.

Radio & Mica Corp., 258 F. 2d 457, 464 (2d Cir.). *A fortiori* the Board cannot find that the cause of a strike was a reason not stated or understood by *either* of the parties.

REASONS FOR GRANTING THE WRIT

A. Salient Undeniable Facts

The following salient facts are undenied and undeniable on this record.

1. The discharged strikers here involved were, in fact, guilty of the misconduct which was the reason for their discharge.

2. This conduct was not merely "unprotected", it was conduct expressly *proscribed* by Sections 8 (b) (1) and 7 of the Act.

This case does not involve the question of the Board's authority to compel reinstatement of strikers guilty of conduct which is merely "unprotected".

It involves the question of the Board's authority to compel the reinstatement of strikers concededly guilty of conduct *proscribed* by the Act.

3. The Act provides an adequate legal remedy for any unfair labor practice by an employer.

The strikers here involved deliberately eschewed such legal remedy and elected instead to engage in illegal conduct, subsequently claimed to have been in reprisal for alleged employer unfair labor practices.

It was not until after the Union's attempts to enforce its demands (none of which related to the later alleged unfair labor practices) by illegal conduct had been

restrained by action of the state authorities,[65] that it *even filed charges* to invoke the legal processes provided by the Act.

Thus this case raises squarely the question as to the Board's authority to declare strikers to be the only class of society authorized to ignore available legal remedies and take the law into their own hands by engaging in illegal conduct allegedly in reprisal for the conduct of someone else.

B. The Board Has No Authority To Establish National Labor Policy—It May Not Do So Even at the Direction of a Court of Appeals

In the recent case of *American Shipbuilding Corp.* v. *N.L.R.B.*, (March 29, 1965—No. 255, Oct. Term 1964, 85 S. Ct. 955, 966), this Court held:

> "However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."

In its concurrent decision in *N.L.R.B.* v. *Brown*, (March 29, 1965—No. 7. Oct. Term 1964, 85 S. Ct. 980, 988), this Court held:

> "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Not only is such review always properly within the judicial province, but courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be

[65] Cf. *U.A.W.* v. *W.E.R.B.*, 351 U.S. 266.

> rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interest, 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' (citing *American Shipbuilding Corp. v. N.L.R.B., supra*)
>
> Courts must, of course, set aside Board decisions which rest on 'an erroneous legal foundation'."

This Court has made it clear that major policy decisions in the labor relations field are for Congress—not for the Board.

The rule of the *American Shipbuilding* and *Brown* cases applies *a fortiori* here.

In those cases the Board exceeded its authority by attempting to prescribe a national labor relations policy which Congress had not prescribed.

In the instant case it goes still further and assumes authority to create a *major exception* to the policy which Congress *has* prescribed, and to virtually repeal that policy.

In Section 8 (b) (1) of the Act Congress expressly and *without exception* proscribed coercion or restraint of employees in the exercise of the rights guaranteed in Section 7 of the Act.

Moreover, Congress, in defining the national labor relations policy, expressly declared that:

> "The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Act, Section 1, 29 USCA 151)

Congress said, in effect, "This conduct is unlawful."

The decisions of the Board and of the lower court in this case say, in effect, "This conduct is lawful if it is provoked."

The Board has not authority to so emasculate the plain mandate of Congress—nor does a court of appeals have authority to direct it to do so.

The exception which the Board's decision herein creates swallows the rule which Congress had laid down.

The review we seek here is, like that in the *Brown* case (*supra*), not of a question of fact. The Board found, and still does not deny, that these strikers were guilty of the unlawful conduct for which they were discharged. The question is one of law and national labor relations policy.

C. The Board's Decision Does Not Effectuate But Defeats the Policies of the Act

The Board's authority to order affirmative action, such as reinstatement and back pay, is limited to such "as will effectuate the policies of this Act." (Act, Section 10 (c), 29 USCA 160 (c))

The Board is not the absolute judge of what will effectuate the policies of the Act.

The decision of the Board herein clearly defeats the policies of the Act.

As this Court held in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 258:

> "We are of the opinion that to provide for the reinstatement or re-employment of employees guilty of the acts which the Board finds to have

> been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."

Following the rule laid down in *Fansteel*, the Seventh Circuit in *N.L.R.B.* v. *Indiana Desk Co.*, 149 F. 2d 987, 995, stated:

> "To hold that the striking employees in this case are entitled to be reinstated, some of them with back pay, is to put a premium on their misconduct and to encourage like conduct on the part of others. How such action can effectuate the policies of the Act is beyond our comprehension."

The Board itself concedes that an order of reinstatement encourages the misconduct thus condoned. In its supplemental decision herein it recognizes:

> "... the encouragement such misconduct would receive, with the possible disorder and instability which such encouragement might induce in collective bargaining, were we to order them reinstated." (Supp. J.A. 2366)

The effects of the decision of the Board herein are already apparent.

In a case subsequent to and based upon the Board's decision herein, *Oneita Knitting Mills, Inc.*, a case also involving the reinstatement of strikers discharged for misconduct, the Board adopted in toto the interpretation by its trial examiner of the decision herein:

> "While the net result of this may be that anything short of aggravated assault will not disqualify such a striker, this policy is deemed binding upon the undersigned." (153 NLRB No. 4, June 17, 1965, Trial Examiner's Decision, p. 9)

The Board's decision in the instant case gives the green light to all illegal conduct except perhaps that amounting to "aggravated assault".

What Congress has declared illegal and necessary to eliminate and to effectuate the policies of the Act the Board now holds to be permissible.

The Board now makes the specious argument that such a reversal of the declared policy of Congress is necessary on the ground that not to reinstate these employees "would be to permit the Respondent to take advantage of its own wrongdoing."[66]

This argument embodies two obvious fallacies:

(1) The Act provides adequate sanctions to prevent an employer benefiting from an unfair labor practice. An employee who loses his job *because* of an unfair labor practice is entitled to reinstatement. An employee who strikes in protest against an unfair labor practice retains reinstatement rights. This is adequate assurance that the employer will not profit from his own wrong.

There is no excuse for extending the mantle of the Act's protection to cover one who deliberately chose to ignore the legal processes provided by law and engaged in illegal acts.

The Board's reinstatement order here allows the *strikers* to benefit from their own wrong.

---

[66] Supp. J.A. 2359.

(2) The strikers here involved did not lose their jobs because of any unfair labor practice of Kohler Co.[67]

They were discharged *because of their own illegal conduct.*

No striker lost his job because he went on strike to protest any Company action.

The strikers here involved lost their jobs *solely and only* because of *their own illegal and coercive acts.*

The Board completely ignores the lack of *causal relationship* between the alleged unfair labor practice and the illegal conduct which was the cause for discharge.

The order of reinstatement allows these strikers to benefit from their own wrongful and illegal conduct.

D. The Board Exceeded Its Authority in Ordering the Reinstatement of Individuals Discharged for Cause

Section 10 (c) of the Act provides, in pertinent part:

"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." (29 USCA 160 (c))

The legislative history makes clear that unlawful conduct is cause for discharge under 10 (c).

---

[67] The argument that the illegal conduct of these strikers was only a pretext for their discharge was made and rejected by the original Board (128 NLRB at 1102, n. 63; J.A. 65, n. 63), a finding accepted by the succeeding Board (Supp. J.A. 2356).

The following language, from the *House Conference Report,* is pertinent:

> "For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed'. This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in Section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." *House Conference Report* No. 510 on H.R. 3020, p. 39, Legislative History of the Labor-Management Relations Act 1947, p. 543.

and:

> "Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement . . ., wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having

> that protection, since obviously persons who *engage in or support unfair labor practices will not enjoy immunity under the act.*" (emphasis supplied) *House Conference Report* No. 510 on H.R. 3020, p. 40, Legislative History of the Labor-Management Relations Act 1947, p. 544.

and:

> "As previously stated, employees are subject to the provisions of section 8 (b) only when they act as agents of representatives, but in these and other cases, *when they are disciplined or discharged for engaging in or supporting* unfair practices, *they do not have immunity* under section 7." (emphasis supplied) *House Conference Report* No. 510 on H.R. 3020, p. 54, Legislative History of the Labor-Management Relations Act 1947, p. 558.

Congress flatly outlawed coercion of employees in the exercise of their rights under the Act and provided that the Act should not grant "immunity" to those who engaged in such coercion.

Congress did not see fit to make any exception to that flat prohibition.

The Board has no authority to write any exception into that flat prohibition, much less one which virtually emasculates the prohibition.

Nor may any court of appeals direct the Board to so exceed its authority.

The Board's authority is limited to the determination of a single question, "Did the discharge interfere with any right guaranteed by the Act?"

It is clear that the Board construes its functions too expansively when it claims general authority to define national labor policy and assumes authority to deter-

mine an individual's qualifications for "future job performance" and whether or not the individual is "unfit for future service."[68]

The Board has a right to interfere with an employer's right to discharge only when that right is used to intimidate or coerce employees in the exercise of their rights under the Act.

As this Court declared soon after the Act was passed, in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the board is not entitled to make its authority a pretext for interference with the right of discharge when that right of discharge is exercised for other reasons than such intimidation and coercion."[69]

No right is given under the Act to engage in illegal conduct. As this Court held in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (a case involving an unfair labor practice strike):

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land."

---

[68] Supp. J.A. 2359, n. 20; Cf. *American Shipbuilding Corp.* v. *N.L.R.B.*, supra, at p. 25.

[69] The Board has here found that the illegal conduct was the real reason for the discharges. 128 NLRB 1102, n. 63; J.A. 65, n. 63.

Congress emphatically concurred with the above ruling of this Court and stated:

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, *mass picketing, unfair labor practices,* contract violations or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and *are subject to discharge without right of reinstatement.* The right of the employer to discharge an employee for any such reason is *protected in specific terms* in section 10 (c)." (emphasis supplied) *House Conference Report* No. 510 on H.R. 3020, p. 59, Legislative History of the Labor-Management Relations Act 1947, p. 563.

The Board's decision in the instant case is directly contrary to the specific terms of the statute (Sec. 10 (c)), to the rulings of the courts and to the clearly expressed intent of Congress.

The Board has no shadow of authority to write into Section 10 (c) an exception, not made by Congress and to prescribe a policy in direct conflict with that declared by Congress.

E. The Board's Decision Ignores the Rights Granted to Employees by the Act

The basic principle of the Act is the protection of *employees* from restraint or coercion *by anyone* in the exercise of the rights guaranteed to them under the Act. This basic principle of the Act has been completely ignored by the Board. The Board has considered this matter as one merely of union vs. employer, completely ignoring the rights of the *employees* involved.

The Board has overlooked the fact that the illegal conduct of the union and its supporters was directed—not at the employer—but at *employees.* The injury to the employer was to be accomplished only indirectly, through the medium of injury to Company employees.

It was *employees* who suffered the direct impact of the Union's illegal conduct.

It was *employees* who were deprived of an opportunity to earn a lawful livelihood and who lost wages by illegal mass picketing which kept the plant "shut down like a drum".[70]

It was *employees* whose homes were surrounded and whose families were terrorized by disorderly mobs of "as many as 400, 500 or even 700 persons assembled" shouting vile names, insults, derisive epithets and threats.[71]

The employees against whom the Union's illegal coercion was directed had committed no unfair labor practice. They merely sought to exercise the rights expressly guaranteed to them by Section 7 of the Act. Employees who committed no unfair labor practice suffered loss of wages—striking employees who *did* engage in and support unfair labor practices are rewarded by this decision.

To our knowledge this is the first time in history where it has been held that one may be deprived of his legal rights—not because of any dereliction on *his part*—but because of the alleged dereliction of *someone else* for whose activities he had no responsibility and over whose activities he had no direction or control.

---

[70] 128 NLRB at 1103; J.A. 65.

[71] 128 NLRB at 1106; J.A. 70.

The illogical and inequitable character of such a holding is emphasized where it is also held that such deprivation may be accomplished—not by legal processes—but by *illegal acts.*

The Board's decision here reverses the doctrine of *respondeat superior* and creates a new and illogical doctrine of *respondeat inferior.*

Furthermore, the Board's decision here reverses, *sub silentio,* its prior decisions on the same question.

In *International Longshoremen's and Warehousemen's Union* (Sunset Line & Twine Co.), 79 NLRB 1487, 1496, n. 6, and again in *United Mine Workers of America* (Blue Ridge Coal Co.), 129 NLRB 146, 176, n. 80, modified in other respects 299 F. 2d 441 (D.C. Cir.), the Board held:

> "Unlawful conduct on the part of the Company, if established, would neither extinguish the right of its employees to be free of union restraint and coercion nor justify the Respondent Union's alleged infringement of that right."

These prior decisions of the Board are manifestly correct. The Board's present reversal of its established position is error.

CONCLUSION

Since the decision of the Board and the lower court herein reverses the long standing construction of the Act and raises important questions of national labor relations policy, we submit that a review by this Court

is warranted and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LYMAN C. CONGER
EDWARD J. HAMMER
Kohler, Wisconsin

ELLISON D. SMITH, JR.
610 Barringer Building
Columbia, South Carolina

E. RILEY CASEY
Counihan, Casey & Loomis
1000 Connecticut Avenue
Washington 36, D. C.

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18961

KOHLER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INTERVENOR

On petition to review and set aside, and on request for enforcement of, a supplemental order of the National Labor Relations Board on remand.

Decided April 20, 1965

Before Bazelon, Chief Judge, and Edgerton and Wilbur K. Miller, Senior Circuit Judges.

Per Curiam: In a former appeal[1] we enforced in large part a previous Board order, but remanded the case to the Board for further consideration of two questions: whether the strike was an unfair labor practice strike from its inception and whether any of the 77 strikers denied reinstatement by the Board should be reinstated in light of the principles enunciated in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir.), cert. denied, 348 U.S. 883 (1954). On remand the Board determined that the strike was an unfair labor practice from its inception, and that 57 of the 74 surviving strikers who had been denied reinstatement should be reinstated. The Kohler Company petitions for review.

---

[1] 112 U.S. App. D.C. 107, 300 F. 2d 699, certiorari denied, 370 U.S. 911 (1962).

The Board properly applied the principles announced in our initial decision, and its determinations are supported by substantial evidence on the record viewed as a whole, *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951). The petition for review will be denied, and the Board's supplementary order enforced in full.

So ordered.

Wilbur K. Miller, Senior Circuit Judge, dissents.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

Findings and Policies

Sec. 1 . . .

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. . . .

(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(Filed April 20, 1965)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964.
No. 18,961

KOHLER COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Intervenor.*

On Petition to Review and Set Aside, and on Request for Enforcement of, a Supplemental Order of the National Labor Relations Board on Remand.

Before: Bazelon, Chief Judge, and Edgerton and Wilbur K. Miller, Senior Circuit Judges.

Judgment

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside, and a request for enforcement of the supplemental order of the National Labor Relations Board entered after remand, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the petition to set aside the order of the National Labor Relations Board is denied, and the supplementary order of the Board on review herein will be enforced in full.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Dated: Apr 20 1965 *Per Curiam.*

Senior Circuit Judge Wilbur K. Miller dissents.

(Filed July 8, 1965)

Decree

Before: Bazelon, Chief Judge; Edgerton and Wilbur K. Miller, Senior Circuit Judges.

This cause came on to be heard upon a petition to review and set aside and upon a cross-petition to enforce a supplemental order of the National Labor Relations Board issued against the petitioner on September 29, 1964, after proceedings pursuant to remand. The Court heard argument of respective counsel on April 6, 1965, and has considered the briefs and supplemental record filed in this cause. On April 20, 1965, the Court being fully advised in the premises handed down its opinion denying the petition to review, and granting enforcement of the Board's supplemental order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the District of Columbia Circuit that the said supplemental order of the National Labor Relations Board in said proceedings be enforced, in full, and that Kohler Co., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ David L. Bazelon
Chief Judge

/s/ Henry W. Edgerton
Senior Circuit Judge

.....
Senior Circuit Judge

Dated: Jul 8 1965

Senior Circuit Judge Wilbur K. Miller dissents.

/s/ Wilbur K. Miller

Filed January 26, 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
KOHLER COMPANY, *Intervenor.*

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

KOHLER COMPANY, *Respondent.*

No. 16,182

KOHLER COMPANY, a Wisconsin Corporation, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petitions to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Chief Judge, and Edgerton and Bazelon, Circuit Judges.

Judgment

These case came on to be heard on the record from the National Labor Relations Board and on petitions to review and set aside, and a cross-petition for enforcement of, the order of the National Labor Relations Board herein, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases is hereby affirmed and will be enforced, except as to so much of the order as denies reinstatement to 77 discharged employees, which portion of the order is hereby set aside.

Pursuant to Rule 38(b) of this court the Board shall within 10 days serve upon the respondent and file with this court a proposed enforcement decree consistent with the opinion of this court and with this judgment.

It is FURTHER ORDERED by the court that the proceedings herein are hereby remanded to the Board for further proceedings with respect to the 77 discharged employees in light of the opinion of this court and for modification of its order if necessary.

PER CIRCUIT JUDGE BAZELON.

Dated: January 26, 1962.

Separate dissenting opinion by Chief Judge Wilbur K. Miller.

Decree

Before: Wilbur K. Miller, Chief Judge, and Edgerton and Bazelon, Circuit Judges.

These case came on to be heard on the record from the National Labor Relations Board and on petitions to review and set aside, and a cross-petition for enforcement of, the order of the National Labor Relations Board issued by it on August 26, 1960, against Kohler Company, its officers, agents, successors and assigns. The Court heard argument of respective counsel on September 11, 1961, and has considered the briefs and transcripts of record filed in these proceedings. On January 26, 1962, the Court, being fully advised in the premises, handed down its opinion affirming and enforcing the order of the National Labor Relations Board on review in these cases except as to so much of

the order as denied reinstatement to 77 discharged employees, which portion of the order was set aside. Judgment was entered on the same day remanding the proceedings to the Board for further proceedings with respect to the 77 discharged employees in the light of the Court's opinion and for modification of the Board's order if necessary. Consistent with such opinion and judgment, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court of Appeals for the District of Columbia Circuit that the Respondent, Kohler Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, as the exclusive representative of its employees in the unit found to be appropriate, namely,

> All production and maintenance employees of Respondent's Kohler, Wisconsin, plant, including shop office stenographers, American Club employees, all employees described in the October 23, 1950, Supplement "B" of the contract executed on August 31, 1950, between Respondent and the Kohler Workers Association and all employees described in Supplement "F" of the contract, including employees doing experimental work in the development department, but excluding general office and clerical employees, draftsmen, technicians, clerks in the medical department, employees in the employment department, doctors, dentists, nurses, engineers, employees in the chemical and physical laboratory, confidential employees, watchmen, guards, and supervisors as defined in the National Labor Relations Act.

(b) Discouraging membership in Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft &

Agricultural Implement Workers of America, or in any other labor organization of its employees, by discriminatorily discharging them or refusing them reemployment or reinstatement on the same basis as other employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(c) Threatening and promising benefits concerning the handling of grievances by union stewards; soliciting and promising benefits to procure the return to work of strikers; serving eviction notices on striking employees and evicting them from their living quarters or leased premises because they are on strike; engaging in unlawful surveillance.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959, hereinafter called the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, as the exclusive representative of all employees in the aforementioned appropriate unit, and, if an understanding

is reached, embody such understanding in a signed agreement.

(b) Upon request, furnish Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, with information concerning incentive earnings as requested by it on January 20 and February 6, 1954, respectively.

(c) Upon application, offer to the employees whose names are listed in Appendix A attached hereto (except James Rogers, LaVern H. Kuhlow, Mrs. Lucille M. Strutz, Mrs. Margaret A. Balnaitis, Mrs. Susie Trester, Marion Haas, Yvonne Pantel, Florence Temme, and Arline Wunsch) reemployment on the same basis as accorded the nonstriking shell department employees, i.e., permanent jobs with retroactive seniority to the date of their original hire, and make them whole in accordance with the Board's remedial policies (*Chase National Bank,* 65 NLRB 827; *Crossett Lumber Company,* 8 NLRB 440; *F. W. Woolworth,* 90 NLRB 289) for any loss of earnings which they may suffer by reason of the Respondent's refusal, if any, to reinstate them in the manner provided above and more fully described in the Remedy, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of the Respondent's offer of reemployment.

(d) Immediately credit Marion Haas, Yvonne Pantel, Florence Temme and Arline Wunsch with full seniority dating back to the date of their original hire.

(e) Upon application, offer Alex Dottei and each other striking employee (except those 77 strikers listed in Appendix C) attached hereto who had not been permanently replaced prior to June 1, 1954, immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges,

dismissing if necessary any person hired on or after that date. If after such dismissal, there are insufficient positions remaining, those strikers, for whom no employment is immediately available, shall be placed upon a preferential hiring list with priority determined among them by such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Respondent's business and thereafter, in accordance with such list, shall be offered reinstatement as positions become available, and before other persons are hired for such work. The Respondent shall also make the foregoing employees whole in accordance with the Board's remedial policies referred to in paragraph (c) above, for any loss of earnings which they may suffer by reason of the Respondent's refusal, if any, to reinstate them in the manner prescribed above, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reemployment or reinstatement and terminating on the date of the Respondent's offer of employment.*

(f) Offer to each of the employees whose names are listed in Appendix B attached hereto immediate occupancy of his former, or substantially equivalent, living quarters or leased premises on the same terms accorded other employees, and make him whole for any loss he may have suffered by reason of his eviction by payment to him of a sum of money equal to that which he has had to pay as rental for other living quarters or leased premises from the date of his eviction to the date he is offered occupancy in the manner set forth above, plus such additional expenses as he may have incurred during said period as a direct result of his eviction, but less the amount he would normally

---

* The foregoing provision shall be without prejudice to the ultimate right to reinstatement of employees who may have been replaced between April 5 and June 1, 1954, in the event the Board, upon remand, determines that the strike was an unfair labor practice strike from its inception.

have paid to Respondent as rent for his living quarters or leased premises during said period.

(g) Preserve and, upon request, make available to the Board or its agents, for examination, and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the reinstatement rights, backpay due, occupancy of living quarters or leased premises, and losses which may have been incurred by the evictions.

(h) Post in its plant at Kohler, Wisconsin, copies of the notice attached hereto marked "Appendix D." Copies of such notice to be furnished by the Regional Director of the National Labor Relations Board (Chicago, Illinois) for the Thirteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the said Regional Director in writing, within 10 days from the date of this Decree what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the proceedings herein are hereby remanded to the Board for further proceedings with respect to the 77 discharged employes in light of the opinion of this Court and for modification of its order if necessary.

Judge, United States Court of Appeals for the District of Columbia Circuit

---

Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX A

Shell Department Employees Discharged
July 1, 1954

Willard A. Braun
James A. Johnson
Mrs. Wilma M. Bonasky
James Rogers
Robert D. Reineking
Donald L. Goetsch
Leonard Schneider
Mrs. Lillian L. Hochrein
William R. Ploetz
Celilia B. Winebrenner
Arthur F. Zillner
Alton J. Klein
Henry C. Hoppert
Bernard B. Novotny
Dennis G. Tetschlag
Viola A. Gilpin
Beatrice I. Gessler
Donald G. Kempers
Emily Oehldrich
Mrs. Leila L. Katte
Elvera A. Konopik
Marilyn G. Schultz
Delores A. Leithner
Kathryn Kleefisch
Yvonne C. Pantel
Edna DeVriend
Virginia Jackson
Marion E. Haas
LaVern H. Kuhlow
Mrs. Alvina Dross
Mrs. Bernice M. Chvarak
Mrs. Susie Trester
Mrs. Marcella G. Markstháler
Mrs. Delores A. Heimer
Mrs. Jeanette A. Zelle
Mrs. Lucille M. Strutz
Mrs. Rosabelle Klinzing
Mrs. Florence A. Temme
Shirely H. Meissner
Mrs. Laura E. Piontkowski
Mrs. Dolly Schimpf
Mrs. Margaret A. Balnaitis
William M. Hinz
Darlene M. Gillingham
Arline Wunsch
Mrs. Norma H. Bohenstengel
Mrs. Inez H. Osthelder
Mrs. Emily M. Leng
Ann I. Leonhard
Walter H. Schmidt
James M. Seubert
Jacob Vander Kuyl
Marjorie Damrow

APPENDIX B

Henry Arnoldi
Carl Faas
Ervin Siech
Peter Gasser
Frank Novak
John Siech
Walter Siech
Gordon Daniels
Lee Blandin
Ove Gjersten

APPENDIX C

Christ Arnold
James E. Bailey
Walter Barchacky
Arthur Bauer
Ethan Berg
John C. Bowser
Leo J. Breirather
Arbor L. Brewer
Roland Buhk
Alvin G. Burkard
Frederick Bryrum
Anthony Champeau
Lyell F. Clark
Lester Damrow
Robert R. Dean
Ervin Eckhardt
Fred Felde, Jr.
Carl Felsinger
Fred Felsinger
Ronald J. Fischer
Ella Frazier
Lloyd Frerichs
Paul A. Gall
Allan J. Graskamp
Elmer H. Gross
Richard J. Gruenke
Rudolph Gunderson
Clarence Hess
Victor Hicks
Eugene M. Hilderbrand
Edward C. Kalupa
Tony J. Kissel
Harvey H. Klabachek
Raymond Klabachek
George Klauser
Egbert H. Kohlhagen
John Konec
Elmer J. Kraemer
Gustave Leibelt
Fred Liebelt
Harold E. Lindemann
Andrew Lofy
Joseph Lorier
Leon B. Losey
Edward McDougal
Bernard Majerus
Gordon Majerus
Frank Makarevicze
Seraphino M. Marchiando
John M. Martin
William Methfessel
Eddie Meyer
Cornelius Munnik
Curtiss R. Nack
John Nisporic
Kenneth C. Nitsche
Francis "Jim" Olin
Elmer A. Oskey
Henry Osterman
Gordon Peryan
Leo J. Prepster
Norbert Renzelman
Paul Riehl
Carl Rothe
Art Russell, Sr.
Ralph Sabish
Gretchen C. Seybold
Roman Slesrick
Earl J. Smith
Ray Stauber
Gilbert A. Stuckmann
Milton G. Tarkowski
Richard F. Verle
Emil W. Wanta
Joseph Westphal
Robert Winkel
Elmer Zittel

APPENDIX D

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, or in any other labor organization of our employees, by discriminatorily discharging them or refusing them reemployment or reinstatement on the same basis as other employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten or promise benefits concerning the handling of grievances by union stewards; solicit or promise benefits to procure the return to work of strikers; serve eviction notices on striking employees or evict them from their living quarters or leased premises because they are on strike; engage in unlawful surveillance.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist said LOCAL 833, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment as authorized by Section 8 (a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL offer to the following employees:

Willard A. Braun	Donald L. Goetsch
James A. Johnson	Leonard Schneider
Mrs. Wilma M. Bonasky	Mrs. Lillian L. Hochrein
Robert D. Reineking	William R. Ploetz
Celilia B. Winebrenner	Mrs. Laura E. Piontkowski
Arthur F. Zillner	Mrs. Dolly Schimpf
Alton J. Klein	William M. Hinz
Henry C. Hoppert	Darlene M. Gillingham
Bernard B. Novotny	Mrs. Norma H. Bohenstengel
Dennis G. Tetschlag	Mrs. Inez H. Osthelder
Viola A. Gilpin	Donald G. Kempers
Beatrice I. Gessler	Emily Oehldrich
Kathryn Kleefisch	Mrs. Leila A. Katte
Edna DeVriend	Elvera A. Konopik
Virginia Jackson	Marilyn G. Schultz
Mrs. Alvina Dross	Delores A. Leithner
Mrs. Bernice M. Chvarak	Mrs. Emily M. Leng
Mrs. Marcella G. Marksthaler	Ann I. Leonhard
Mrs. Delores A. Heimer	Walter H. Schmidt
Mrs. Jeanette A. Zelle	James M. Seubert
Mrs. Rosabelle Klinzing	Jacob Vander Kuyl
Shirley H. Messner	Marjorie Damrow

reemployment on the same basis as accorded the nonstriking shell department employees, i.e., permanent jobs with retroactive seniority to the date of their original hire, and make them whole for any loss of earnings which they may suffer by reason of our refusal, if any, to reinstate them in the manner provided above and more fully described in the Remedy section of the Board's Decision and Order, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of our offer of reemployment.

WE WILL immediately credit employees Marion Haas, Yvonne Pantel, Florence Temme, and Arline Wunsch with full seniority dating back to the date of their original hire.

WE WILL, upon application, offer Alex Dottei and each striking employee (except those 77 strikers as to whom the Board has dismissed the complaint) who had not been permanently replaced prior to June 1, 1954, immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any person hired on or after that date. If after such dismissal, there are insufficient positions remaining, those strikers, for whom no employment is immediately available, shall be placed upon a preferential hiring list with priority determined among them by such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Respondent's business and thereafter, in accordance with such list, shall be offered reinstatement as positions become available, and before other persons are hired for such work. We will also make the foregoing employees whole for any loss of earnings which they may suffer by reason of our refusal, if any, to reinstate them in the manner described above, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement or reemployment and terminating on the date of our offer of employment.

WE WILL offer to Henry Arnoldi, Carl Faas, Ervin Siech, Peter Gasser, Frank Novak, John Siech, Walter Siech, Gordon Daniels, Lee Blandin, and Ove Gjersten immediate occupancy of his former, or substantially equivalent, living quarters or leased premises on the

same terms accorded other employees, and make him whole for any loss he may have suffered by reason of his eviction by payment to him of a sum of money equal to that which he has had to pay as rental for other living quarters or leased premises from the date of his eviction to the date he is offered occupancy in the manner set forth above, plus such additional expenses as he may have incurred during said period as a direct result of his eviction, but less the amount he would normally have paid to us as rent for his living quarters or leased premises during said period.

WE WILL, upon request, furnish said Local 833 with information concerning incentive earnings as requested by it on January 20 and February 6, 1954, respectively.

WE WILL, upon request, bargain collectively with said Local 833 as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of our Kohler, Wisconsin, plant, including shop office stenographers, American Club employees, all employees described in the October 23, 1950, Supplement "B" of the contract executed on August 31, 1950, between us and the Kohler Workers Association and all employees described in Supplement "F" of the contract, including employees doing experimental work in the development department, but excluding general office and clerical employees, draftsmen, technicians, clerks in the medical department, employees in the employment department, doctors, dentists, nurses, engineers, employees in the chemical

and physical laboratory, confidential employees, watchmen, guards, and supervisors as defined in the Act.

KOHLER CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 3 1965
JOHN F. DAVIS, CLERK

No. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

KOHLER CO., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents.*

BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

JOSEPH L. RAUH, JR.,
JOHN SILARD,
STEPHEN I. SCHLOSSBERG,
1625 K Street, N. W.,
Washington, D. C.
Attorneys for Local 833, UAW-AFL-CIO.

INDEX

	Page
No Substantial Question Is Presented by a Board Decision Compelled by the Long Record of Kohler's Calculated and Provocative Violations of Its Workers' Statutory Rights	3
A. The Pre-Strike Bargaining Question—20 Years of Kohler Contempt for Federal Law	3
B. The Dischargee Question—"Unremitting Calculated Provocations" as Ground for Reinstatement	14
Conclusion	20

Table of Cases

Appeal of Coates, 287 P. 2d 102, 47 Wash. 2d 51	17
Glus v. *Brooklyn Terminal*, 359 U.S. 231	17
Kohler Co., 108 NLRB 207 (1954)	5
Mastro Plastics Corp. v. *N.L.R.B.*, 350 U.S. 270 (C.A. 3)	17
N.L.R.B. v. *Clearfield Cheese Co.*, 213 F. 2d 70	19
N.L.R.B. v. *Fansteel Metallurgical Corp.*, 306 U.S. 240	19
N.L.R.B. v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7, 1955)	5
N.L.R.B. v. *Longview Furniture Co.*, 206 F.2d 274 (C.A. 4)	19
N.L.R.B. v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (C.A. 1, 1953), *cert. den.* 346 U.S. 887	7
W. T. Rawleigh Co. v. *N.L.R.B.*, 190 F. 2d 832	19

Miscellaneous

Hearings before the Select Committee on Improper Activities in the Labor or Management Field, 85 Cong., 2d Sess., Part 24, pp. 9607 *et seq.*, pp. 9871 *et seq.*	4
House Conference Rept. No. 510, on H.R. 3020, at p. 55	18
The Kohler Company, 1 Decisions of the National Labor Relations Board, 72, 75 (1934)	4
Walter H. Uphoff, *The Kohler Strike* (1935), *passim*	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents.*

BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

This is Kohler Company's third application for certiorari in a single Labor Board case already in litigation for eleven years. Kohler first sought to transfer the proceedings out of the District of Columbia Circuit (cert. denied, 365 U.S. 869). Then it sought review of the 1962 Court of Appeals decision enforcing the 1960 Labor Board ruling which found Kohler in numerous violations of the Labor Act and remanding to the Board two subsidiary questions (cert. denied, 370 U.S. 911). It is upon those two subsidiary

questions remanded to the Board that Kohler presently seeks this Court's review.

On August 26, 1960, following six years of proceedings before the National Labor Relations Board involving more than twenty thousand pages of testimony and one thousand exhibits, the Board unanimously found Kohler guilty of repeated violations of its obligations under the federal labor law. On January 26, 1962, the court below (300 F. 2d 699, Supp. J.A. 2318) affirmed the Board's findings that the Company had engaged in numerous violations of its obligations under the law, including refusal to bargain on and after June 1, 1954, unlawful unilateral wage increases, illegal inducement of workers to abandon the strike, prohibited surveillance of protected activities, arbitrary refusal to furnish data necessary for bargaining, discriminatory denial of housing to striking workers and discriminatory discharge of strikers.[1] And going even beyond the Board's findings, the court below remanded to the Board for further findings and disposition the question whether the Company had refused to bargain in good faith prior to the commencement of the strike on April 5, 1954, and the question whether 77 strikers discharged for "misconduct" should be reinstated pursuant to the discretionary authority of the Board under Section 10(c) of the Act. Certiorari was denied on June 4, 1962 (370 U.S. 911).

On September 29, 1964, the Board issued its Supplemental Decision and Supplemental Order (Supp. J.A. 2339)

---

[1] The Board and the Court of Appeals directed reinstatement of strikers, "dismissing if necessary, any person hired on or after" June 1, 1954 (J.A. 81). Upon Kohler's refusal to dismiss the strikebreakers and its failure to make proper reinstatement of strikers, the Board instituted contempt proceedings. A Special Master has found Kohler in contempt and this matter is pending before the court below (*N.L.R.B.* v. *Kohler Co.*, No. 16,031).

holding that the strike was an unfair labor practice strike from its inception in April, 1954, and reinstating 57 of the 77 discharged strikers. The Company now seeks review of the Court of Appeals' affirmance of these two rulings, but it fails to set forth the salient facts upon which they are predicated. The applicable facts found by the Board, which we review herein, were compelling on the determination whether the strike was originally provoked by the Company's unfair labor practices and whether certain of the discharged strikers should be reinstated "to effectuate the policies" of the Act. Since Board rulings whether a strike is economic or unfair labor practice in origin and whether to reinstate strikers to effectuate the policies of the Act are clearly within the areas of its statutory authority, the overwhelming factual underpinning of the Board's determinations in this case demonstrates without more the absence of any colorable issue for this Court's review.

No Substantial Question Is Presented by a Board Decision Compelled by the Long Record of Kohler's Calculated and Provocative Violations of Its Workers' Statutory Rights.

A. *The Pre-Strike Bargaining Question—20 Years of Kohler Contempt for Federal Law*

1. In 1933, faced with the threat of organization by the American Federation of Labor, Kohler built its own "union"—the Kohler Workers' Association. Lyman Conger, who for many years has been Kohler's principal spokesman in labor relations matters, participated in launching KWA (J.A. 3468-3470, 3874-3876). The circumstances of the founding of KWA were carefully sifted by the pre-Wagner Act Labor Board in 1934, with a view to determining Kohler's compliance with the guarantees of un-

coerced organization and bargaining embodied in the National Industrial Recovery Act:

> "Thus it is clear that the company participated in forming and engaged actively in promoting the new organization, that the workers had no opportunity of expressing an unfettered choice as to whether or not they wished to belong to it, and that the company not only indicated its favorable attitude toward the organization but stood ready to finance its existence. Under such circumstances, the organization could not have that independence which is essential to a true collective bargaining agency, and the sudden and extensive promotion of the plan at a time when an outside union was just being formed can only be considered as a deliberate design to influence the allegiance of the employees and to interfere with their free and unhampered self-organization which Section 7(a) guarantees." *The Kohler Company*, 1 Decisions of the National Labor Relations Board, 72, 75 (1934).

2. The following year, 1934, the AFL went on strike at Kohler. The Company repulsed the AFL's efforts with a bloody ferocity which stamped Kohler's attitude toward labor relations as unique even in that era. See Walter H. Uphoff, *The Kohler Strike* (1935), *passim; Hearings before the Select Committee on Improper Activities in the Labor or Management Field*, 85 Cong., 2d Sess., Part 24, pp. 9607 *et seq.*, pp. 9871 *et seq.* Thus was ushered in the era of company-dominated "labor peace," the perpetuation of which has remained Mr. Conger's guiding philosophic star in the conduct of Kohler's labor relations ever since 1934. In September of 1954 Conger recalled those events to Judge Arold Murphy, as he rebuffed the Judge's attempts at conciliation: " He [Conger] said that there had been a

bitter strike in 1934; that it resulted in twenty years of labor peace, and that he was going to insist that this strike bring to the Company twenty years of labor peace, and that at some place along the line, he said, 'we are going to teach the union a lesson' " (J.A. 193).

3. The Company's union, KWA, proceeded smoothly upon its unarduous duties until the mid-1940s, when the first signs of opposition to the company union appeared. But it was not until 1951 and 1952, when the UAW first attempted to organize Kohler, that it became necessary for Kohler to resume its coercive anti-unionism. The pattern of Kohler's anti-union attitudes and illegal activities during this period is detailed in *Kohler Co.*, 108 NLRB 207 (1954), and *N.L.R.B.* v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7, 1955). As the Court of Appeals for the Seventh Circuit observed in its enforcement opinion: "The Company argues that there was no proper evidence showing a background of hostility toward the UAW. But throughout the contest between the KWA and the UAW the officers of the Company certainly made no attempt to conceal the fact that they did not want the UAW in the plant, and after the first election, which was won by the KWA, Conger, the Chairman of the Company's Management Committee, boasted: 'We are the ones that won that election for you. We got on the air and put ads in the papers and we are certain that is what changed the picture, otherwise we might be meeting with somebody else right now.' " *Id.* at 9.

4. In 1953, following the UAW's victory in the election of a bargaining representative, Kohler grudgingly concluded a minimal one-year contract with the UAW. But no sooner was the agreement concluded than the Company made even its modest concessions illusory by various types of dilatory conduct. After entering into this contract the Company sought to undermine the status and influence of the Union

as collective bargaining representative by failing to supply information necessary to the effective administration of the contract, by taking coercive action toward union stewards, and otherwise making processing of grievances difficult. For example, information vital to the contractual commitments of 1953 concerning the so-called wage-incentive system was withheld from the Union. Many employees complained that they were receiving less take-home pay by virtue of production standards manipulation, but the Union could never determine the truth or falsity of this claim because Kohler refused to supply needed information (see J.A. 84-85).

5. Before and after 1953 President Herbert V. Kohler articulated his animosity toward the UAW. Said Mr. Kohler in 1952: "... Kohler Company, as a Company, is opposed to the UAW-CIO" (Un. Ex. 21, J.A. 2287)—and he added, significantly, "We have had 17 years of industrial peace at Kohler without the CIO ..." (J.A. 2289). From the witness stand in these Board proceedings, Mr. Kohler made plain the implacable attitude with which he entered into the 1953 contract: "I had an idea from the day we signed the first contract that they were going to pull a strike as soon as they could, as soon as they could drench the minds of these people" (J.A. 260). "They are a very militant union, and they have threatened us over the years, and they have gone on strike, and we are trying to protect our lives.... The life of the Company, that is" (J.A. II, 287). And by November of 1955 Mr. Kohler had generalized the problem: "Who runs this country? ... That is the issue at Kohler. It is the potential question for all industry. We must meet this issue fighting" (G.C. Ex. 326).

6. Negotiations between the Union and the Company for a new contract commenced in early 1954. The Company was "obligated to make some reasonable effort in

some direction to compose differences with the Union." See *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (C.A. 1, 1953), cert. denied, 346 U.S. 887. Far from making any such effort, Kohler deliberately offered only what the Union obviously could not accept. Kohler's conduct with respect to the principal issues between the parties regarding a new contract manifested its desire not to reach but to avoid an agreement with the Union.

In early February, 1954, when negotiating sessions commenced, the Union sought a substantial wage increase; a union shop; the standard UAW pension plan; improvements in the seniority guarantees; increased hospitalization and related benefits; and some amelioration of the conditions of the disadvantaged enamel workers. Kohler, at the outset of the negotiations and throughout the entire prestrike period, rejected *every* significant Union proposal. In addition, Kohler proposed dilution of the seniority guarantees and proposed to "clarify" the existing arbitration arrangements by withdrawing such vital matters as discharges from the arbitrator's jurisdiction and by rendering arbitral awards more vulnerable to judicial attack. On none of the central issues—wage increase, union shop, meaningful arbitration—did Kohler ever make a substantive concession.

7. At the outset of the 1954 negotiations Kohler had proposed a new contract which was in no respect more advantageous to the workers and in many significant respects less advantageous than the existing contract. Until late February Kohler insisted that this was its only proposal. Then, as a UAW International Representative testified,

> "on the 23rd of February, we had noted to the company during a bargaining session that we were rapidly coming down to the deadline. The contract was due to expire on March 1, and it was obvious from the

lack of progress that we were not going to have an agreement by that time and therefore we requested the company that they extend the contract for one month, through the month of March, so that we would have orderly procedures in the plant for collective bargaining and that we would still be working under a contract during the time that we were developing the terms of a new contract . . ." (J.A. 552-553).

But the Company *rejected* the Union's proposal to facilitate further bargaining by temporarily extending the contract for one month. Kohler announced that "So long as your contract committee continues to insist on exorbitant and unrealistic demands which would jeopardize the future of the company and the jobs of its employees, a short-term extension of the present contract will not serve any useful purpose" (J.A. 2039). Herbert Kohler had himself had occasion to evaluate precisely this kind of negative response two years before. In 1952, according to Mr. Kohler, in the course of negotiations between Kohler and KWA, "Kohler Co. offered to extend the contract with the KWA pending further negotiations" (J.A. 2264). But the offer was declined, and Mr. Kohler asserted: "*This is not the conduct of people who wish to arrive at a settlement. It is the conduct of people who do not want a settlement, but who want a dispute*" (J.A. 2264).

8. On February 25, 1954, Kohler countered the Union request for a one-month extension of the contract with a proposal for a one-year extension, including the existing arbitration provision (J.A. 142); and on the next day Kohler proposed as an alternative a 3-cent per hour wage increase conditioned on acceptance in toto of Kohler's proposed contract emasculating existing arbitration procedures (J.A. 142-143). If the Union wished to forego any wage

increase, the Union could keep the arbitration provision contained in the 1953 agreement. If the Union wished to take the munificent 3 cents, the Union would have to agree to a contract even more unfavorable, especially with respect to the crucial arbitration provision, than the one which was about to expire. The Company's conditioning of even a paltry 3-cent wage increase upon the Union's relinquishing existing arbitration rights, and its offer to continue those arbitration rights only at the expense of any wage increase whatever, demonstrate a desire to offer only that which the Union obviously could not accept.

9. Kohler's disdain for genuine unions, and its indifference to its statutory obligation to bargain with the certified union of its employees' own choosing, were clearly manifested during the entire pre-strike negotiating sessions. These sessions were punctuated by Conger with his "usual phrase of he didn't see any point in wasting any more time, or didn't see that as they had went as far as they were prepared to go there was no reason to continue" (J.A. 1083-1084). Again, as one of the Union negotiators recalled, "When we would start discussing a direct contractual issue, or a comparison of a contractual point, we never could keep the Company on the subject matter before us. They went into violent attacks against the UAW generally, not just this local union, but throughout the country, and pointed to organized labor in general as being the cause of the ills of the country" (J.A. 952). Meanwhile, Kohler was proceeding with strike preparations which, to judge from the findings made by the Wisconsin Employment Relations Board, drew heavily upon Kohler's bloody repulsion of an independent union back in 1934:

> "There was testimony by the President of the Company to the effect that the Company had equipped and has in its plant a small arsenal. He testified that

there were clubs and guns provided for in the plant. His testimony also indicated that either there were tear bombs provided for in the plant but if not the presence of tear gas bombs would have his approval. With all the legislation on the books today, both Federal and State, aimed at protecting, not only the rights of employees and employers in labor disputes, but the rights of the public as well, it seems inconceivable that in a forward-looking community in a state as progressive as the state of Wisconsin any employer would feel it necessary to resort to self-help by the means of arms, ammunition and tear gas bombs. There is no possible justification for an employer today to resort to the use of such means in any strike" (Co. Ex. 42).

10. When the 1953 contract expired on March 1, 1954, and Kohler still refused to engage in genuine bargaining, the Union was forced into action and on April 5, 1954, the strike commenced. Four weeks later, the Wisconsin Employment Relations Board made a major effort to get the parties back to the bargaining table (J.A. 635-636). As the Wisconsin Board itself described its intervention:

"the Board laid down certain conditions, largely limitations on the type of picketing theretofore conducted, that if accepted by the Union would result in a continuance of the hearing. Conditions laid down by the Board were accepted by the Union. Acceptance of such conditions was contingent on the Company agreeing that it would immediately commence bargaining with representatives of the Union in a bona fide attempt to reach a mutually satisfactory collective bargaining agreement. Arrangements for such bargaining session were immediately made, the first meeting

to be held on Friday, May 7. Such meeting took place with a panel of three impartial mediators present. The bargaining continued throughout that day. In the meantime on Thursday and Friday, picketing was carried on pursuant to the truce agreement. Persons desiring to go to and from the Kohler plant proceeded freely. There was no substantial interference with anyone desiring to enter or leave. At the conclusion of the Friday conference, notwithstanding that the Federal mediators were willing, and the Union representatives were desirous, of continuing the negotiations both on Saturday and Sunday if necessary, the Company representatives arbitrarily refused to bargain on either of those days" (Co. Ex. 42, pp. 7-8).

Conger's stated excuse for not meeting further was that he needed the weekend to prepare a brief due the following Tuesday in the United States District Court action brought by the Union to enjoin further prosecution before the WERB of the Kohler Company's complaint of unfair union practices, over which the state board was thought by the Union to have no jurisdiction (J.A. 3680-3681). Conger persisted in his refusal to meet, notwithstanding the Union's expressed willingness to join with Conger in a request to District Judge Tehan for an extension of time to file briefs in the federal action (J.A. 3681-3682). That there would have been no difficulty in securing such an extension is clear. Indeed on May 14, in exploring settlement possibilities with the parties in chambers, Judge Tehan took occasion to comment on Conger's stalling tactics:

"... Judge Tehan said that he was provoked with the statements that he read in the press, that the company was using the filing of briefs before the United States

District Court as an excuse for not continuing bargaining after May 7th, and he promptly told Mr. Conger:

> 'You know that our rules are quite flexible, and if you wanted an adjournment on the filing of briefs, you could have gotten it for days and months; if this would help settle the strike, that is a more important thing than the filing of briefs' " (J.A. 1467).

Nor is there room for doubt that Conger's refusal to go forward with negotiations over the weekend of May 8 and 9, 1954, gravely jeopardized settlement possibilities. As the WERB later observed: "We are thoroughly satisfied that had the company representatives honestly desired to arrive at settlement of the dispute, they would have been anxious to bargain and would honestly have tried to arrive at a settlement of the issues responsible for this unfortunate work stoppage" (Co. Ex. 42, p. 8).

11. On June 1, 1954, soon after the strike commenced, Kohler granted a unilateral wage increase which eloquently bespoke its continuing unconcern with the statutory requirement of collective bargaining (J.A. 31, 35, 3585-86). The three pennies which Conger had earlier "offered" the Union as the *quid* for the *quo* of foregoing arbitration, suddenly became three pennies which Conger benevolently and unconditionally dispensed to Kohler employees—without consulting or even notifying the exclusive bargaining representative of the employees. Not only was the unilateral increase, as the Board found, a flagrant and grossly prejudicial blow to subsequent negotiations, but the increase withheld from the Union and granted the workers shows again that the only principle motivating the Company at the pre-strike negotiations was the principle of avoiding an agreement with the Union.

12. In determining the genuineness of the Company's

pre-strike bargaining, its anti-union animus, its illegal aggressions against unions and union members, and its conduct of "negotiations," correlate closely with Kohler's record of noncooperation with all public officials who called on Kohler to try to reach an agreement with the Union. Early in the strike Kohler brushed off the conciliation efforts of a federal district judge, Judge Tehan (J.A. 3687-3688), and a state judge, Judge Schlichting (J.A. 1477). Thereafter, Kohler persisted in its pattern of stubborn indifference to its public responsibilities when it (a) refused the arbitration proposal made by Governor Walter J. Kohler (a nephew of Kohler's President) (G.C. Ex. 43); (b) in September, in "its private meetings with Judge Murphy . . . did not even pretend to go through the motions of collective bargaining, despite the Judge's repeated assurances that a slight wage increase would settle all issues in dispute" (J.A. 199); (c) in April, 1955, rejected the proffered good offices of the Mayor and other municipal officials of Sheboygan, Wisconsin (J.A. 2120); (d) in June, 1955, rejected the proffered good offices of a subcommittee of the United States Senate (J.A. 2136-2138). The following November President Kohler explained to an audience in Birmingham his philosophy about proposed interventions of this kind: "The do-gooders have mixed in with offers to help settle the strike. All they really want to do is save face for the Union . . ." (G.C. Ex. 326).

13. Finally, it cannot be put aside in the evaluation of the Company's so-called "bargaining" in the pre-strike period that only a few weeks following the last pre-strike negotiating session of April 3, 1954, the Company commenced its adjudicated 6-year refusal to bargain in good faith with the Union. 300 F. 2d 699, Supp. J.A. 2318, cert. denied 370 U.S. 911. The Company continued its illegal course of conduct to the date of the Board's 1960 decision (and see n. 1, p. 2, *supra*), engaging in numerous violations in disparagement

of the bargaining representative and the freedom of collective protection guaranteed the workers under the Act. Such adjudicated violations include refusal to furnish data necessary for bargaining, unlawful surveillance of Union and workers, discriminatory discharge of striking temporary employees in the Shell Department, discriminatory eviction of strikers from their homes, and two unilateral wage increases not offered to the Union but granted the workers (J.A. 22-28, 149-154, 60-64, 388-394; 40-41; 177-182; 52, 227, 232-234; 31, 34-38, 171-172, 209-210).

• • • • •

The considerations recited above were compelling upon the Board with respect to the question whether the 1954 strike was an unfair labor practice strike in its inception. The Board in a careful analysis replete with recitation of the pertinent facts (Supp. J.A. 2342 to 2354), finds in its 1964 Supplemental Decision that the Company "failed and refused to bargain collectively with the Union in good faith . . . and that this unfair labor practice caused the strike which began on April 5, 1954." No substantial factual or legal question is presented to this Court by the Board's finding on that score. Nor is a material issue presented by the Board's additional finding that the Act's policies are best effectuated by reinstatement of 57 of the strikers discharged by the Company for acts provoked by its own misconduct.

B. *The Dischargee Question—"Unremitting Calculated Provocations" as Ground for Reinstatement*

Section 10(c) of the Act authorizes the Labor Board, upon finding an employer unfair labor practice, to order an employer "to take such affirmative action including reinstate-

ment of employees . . . as will effectuate the policies" of the Act.[2] Exercising that authority, the Board has determined that the "misconduct" of fifty-seven of the strikers discharged by Kohler was, on balance with the Company's unlawful actions provoking that misconduct, not such as to justify their discharge consistent with the policies of the Act. As the Board found (Supp. J.A. 2357):

> "In view of [the Company's] *unremitting calculated provocations,* it is not surprising that the strikers themselves felt compelled to seek both economic survival and the survival of their collective bargaining agent by a massive and sustained demonstration of solidarity. Nor is it surprising that in the face of such provocative conduct by the Respondent, the union leaders urged and directed mass picketing as the only means of Union survival. While we do not condone the mass picketing of the strikers or the planning and direction of such picketing by the union leaders, we must conclude that such activity is attributable no less to the Respondent which provoked that behavior, than to the strikers and union leaders who accepted the challenge presented by Respondent's open preparations and its complete disregard for its employees' statutory rights." (Emphasis supplied.)[3]

---

[2] "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . . No order of the Board shall require reinstatement of any individual as an employee . . . if such individual was suspended or discharged for cause." 29 U.S.C. 160(c).

[3] The misconduct of the fifty-seven reinstated employees consisted of organizing and engaging in mass picketing and demonstrations at the homes of non-strikers. In the case of the remaining dischargees, who had

The strike of last-resort which commenced on April 5, 1954 with desperate mass picketing by hundreds of Kohler workers, was the inevitable human effect of the Company's own pattern of coercive violation of its workers' statutory rights. Twenty years of contemptuous hostility towards its workers' fundamental rights; many weeks of fruitless negotiations in which Kohler manifested its desire to avoid any agreement and dared the Union to preserve its continuing existence by resorting to self-help; and the specific provocations offered by the Company's recourse to armaments of war—all this inevitably drove its workers to seek economic survival by a massive show of solidarity. Thus the fact that workers engaged in conduct preventing operation of the plant is no less attributable to the Company which provoked it than the individuals who succumbed to provocation. Lawlessness begets lawlessness—an employer who flagrantly and continuously violates the legal and human rights of its workers cannot disclaim responsibility when in desperation they are provoked beyond the breaking point.

Kohler's responsibility for the "misconduct" of its workers is thus beyond question, for no reasonable appraisal of the sequence of events at Kohler can disentangle worker "misconduct" from the years of grievous Kohler "misconduct" in violating the rights of its employees. Of course these considerations do not "justify" employee misconduct. *But they do provide the critical element in the Board's determination that the purposes of the Act are best effectuated not by approving the discharge*

---

engaged in acts of violence or threats of violence, although the Board held this misconduct "probably in part provoked by the Respondent's flagrant unfair labor practices" (Supp. J.A. 2366), the Board refused to order reinstatement. Despite this finding of Company provocation, the Union did not appeal the cases of the unreinstated dischargees in the hope, apparently fruitless, that this 11-year proceeding might thereby be more expeditiously terminated.

of employees for misconduct provoked by the employer's lawlessness but by reinstating such employees and thus restoring as far as possible the status quo existing before Kohler embarked upon its coercive sequence of violations.

Indeed, in reinstating strikers discharged for misconduct provoked by the employer, the Board applied a fundamental equitable principle. It is a core concept in our jurisprudence that it does not allow a party to "take advantage of his own wrong." *Glus* v. *Brooklyn Terminal*, 359 U.S. 231. Accordingly, one who provokes another's violence may be barred from recovering damages for his injury. See *Appeal of Coates*, 287 P. 2d 102, 47 Wash. 2d 51. To permit an employer to discharge for striker conduct provoked by his own violations of the Act, far from effectuating the Act's policies, encourages provocative violations calculated to provide grounds for breaking union strength by discharges. Conversely, the Act's purposes *are* clearly effectuated by reinstatement of unfair labor practice strikers discharged for conduct provoked by flagrant employer violations. Cf. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270. Reinstatement in such circumstances merely leaves parties who have violated each other's legal rights in an equivalent position—neither is permitted to penalize the other and the Board's prospective remedies come into play to assure future compliance with the Act.[4]

---

[4] Since Kohler provoked and was contributorily responsible for the retaliatory misconduct of its workers, discharges therefor are not "for cause" within the meaning of the Section 10(c) proviso. The Company misconceives the import of that proviso, which merely codified existing rulings. As Senator Taft explained before the Senate, "all this language does is simply to say exactly what the present rule is . . . For the purpose of the record I am glad to make that statement, because there is no intention whatever to change the existing law on this particular question" (93 Cong. Rec. 6518). Senator Ball confirmed Senator Taft's view (93 Cong. Rec. 7683). The pre-existing law which Congress apparently intended to codify was that embodied by Section 8(3) cases such as *Wyman-Gordon*. It was to the *Wyman-Gordon* situation that the House Conference Report

Finally, exceptional circumstances were presented to the Board in this case by the Company's inclusion among the dischargees of all thirteen leaders of the Union. Certainly, even under the Board's order requiring good faith bargaining, Kohler workers without their experienced leaders are no match for a Company which has for three decades rebelled against its federal bargaining obligation. Accordingly, the most fundamental purposes of the Act were effectuated by the Board's order restoring the conditions prevailing before the unfair labor practice strike, including restoration of the Union leadership. So appropriate an exercise of the Board's power to vindicate the statutory duty of collective bargaining, falling within the very core of the Board's reinstatement authority under Section 10(c) to "effectuate the policies" of the Act, presents no substantial issue for this Court's review.

---

pointed in its specific explanation of the "for cause" proviso—*where the unfair labor practice charged was a discriminatory discharge* in violation of 8(3), and the courts had barred the Board from finding discrimination and reinstating employees who may have belonged to the union but were actually discharged because of the kind of activities enumerated in the House report. See House Conference Rept. No. 510, on H.R. 3020, at p. 55.

But even if it were assumed for argument's sake that the "for cause" proviso was intended to do more than to codify existing 8(3) law (contrary to Senator Taft's explanation), no broader application should be given the proviso than that dictated by reason and authorities from adjacent areas. Those authorities (see cases listed in n. 22 of the first Court of Appeals opinion, Supp. J.A. 2326) generally look to the existence of employer provocation in determining whether misconduct is "cause" or "just cause" for discharge. Thus, in this case, where the misconduct in issue was provoked by Company violations and is not of the kind to indicate employee *unfitness for future service,* it would strain normal and customary construction to find that the misconduct constituted "cause" when balanced against employer provocations and violations. It was therefore unnecessary in the instant case to determine just what constitutes the "cause" for discharge which might have been in the minds of the House conferees, since in any event the conduct here falls outside the normal construction of that term.

Nor is there the conflict alleged by Kohler with this Court's decision in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, or with the Circuit Court rulings in *N.L.R.B.* v. *Clearfield Cheese Co.*, 213 F.2d 70, *N.L.R.B.* v. *Longview Furniture Co.*, 206 F.2d 274, or *W. T. Rawleigh Co.* v. *N.L.R.B.*, 190 F.2d 832. This Court in *Fansteel* did not delete from the Act the Board's express power to reinstate discharged strikers. All that the Court ruled there was that in light of the aggravated conduct of certain sit-down strikers the Board had exceeded its ambit of discretion in their reinstatement: "We are of the opinion that to provide for the reinstatement or re-employment of employees guilty of the acts which the Board finds to have been committed *in this instance* would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure . . . whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review" (306 U.S. at 256, emphasis supplied). Similarly, the Circuit Court decisions cited by the Company in no way impair the Board's discretionary authority in appropriate circumstances to reinstate unfair labor practice strikers.[5] In the absence of any conflict in rulings and

---

[5] In *Clearfield Cheese*, 213 F.2d 70, the Third Circuit reversed a Board "condonation" ruling regarding 21 discharged workers, but no Section 10(c) discretion point was either made to or passed upon by the Court. In *Longview Furniture*, 206 F.2d 274, the Fourth Circuit found that the Board had exceeded its Section 10(c) discretion by reinstating workers who had participated in a criminal assault, but the Court merely returned for Board reconsideration the reinstatement question regarding strikers discharged for less serious misconduct. And in *W. T. Rawleigh*, 190 F.2d 832, the Seventh Circuit only reversed a Board reinstatement order as an abuse of Board discretion where the misconduct of the workers was serious and there was *no provocative employer misconduct* such as that engaged in by the Kohler Company. None of the three decisions deny the Board an area of discretion to reinstate strikers discharged for misconduct in such circumstances as are presented in the present case.

any substantial issue as to the Board's exercise of its statutory discretion to require reinstatement, no grounds are presented for this Court's review of the ruling below.

Conclusion

For the foregoing reasons it is submitted that the writ should be denied.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
STEPHEN I. SCHLOSSBERG,
1625 K Street, N. W.,
Washington, D. C.
Attorneys for Local 833, UAW-AFL-CIO.

(5756-2)

BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 5 1965
JOHN F. DAVIS, CLERK

RECEIVED
AUG 5 1965
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

KOHLER CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

BRIEF AMICUS CURIAE OF WISCONSIN MANUFACTURERS' ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WALTER S. DAVIS
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Counsel

Of Counsel:
O. S. HOEBRECKX

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX.

	PAGE
Interest of Amicus Curiae	2
Argument	5
Conclusion	13

AUTHORITIES CITED.

Cases.

Berkshire Knitting Mills, 46 NLRB 955	10
Dixie Bedding Mfg. Co. v. NLRB, 268 F. (2) 901	13
Martin Sprocket & Gear Co. v. NLRB, 329 F. (2) 417	13
Mastro Plastics Corp. v. NLRB, 350 U.S. 270	6
McNeeley & P. Co. v. NLRB, 106 F. (2) 878	7
Nabors v. NLRB, 323 F. (2) 686	13
Osceola Cty. Co-op Creamery Ass'n v. NLRB, 251 F. (2) 62	11
Universal Camera Corp. v. NLRB, 340 U.S. 474	11
Victor Mfg. & Gasket Co. v. NLRB, 174 F. (2) 867	11, 13
NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240	6n
NLRB v. IBEW, 346 U.S. 464	6n
NLRB v. Mackay R. & T. Co., 304 U.S. 333	5, 6
NLRB v. Marcus Trucking Co., 286 F. (2) 583	13
NLRB v. Nelson Mfg. Co., 326 F. (2) 397	11, 13
NLRB v. Pacific Intermountain Exp. Co., 228 F. (2) 170	11
NLRB v. Thayer, 213 F. (2) 748	3
NLRB v. Washington Aluminum Co., 370 U.S. 9	6n, 10

Statutes.

PAGE

National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC §151 *et seq.*

Section 9(c)(3) 5

Section 10(c) 4, 8

Section 10(e) 11

Miscellaneous.

52 Harv. Law Review 1275 7

1 Leg. Hist. of Labor-Management Relations Act 1947 ..... 8n, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 353

KOHLER CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

BRIEF AMICUS CURIAE OF WISCONSIN MANUFACTURERS' ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

With consent of the parties, the Wisconsin Manufacturers' Association respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Interest of Amicus Curiae.

The Wisconsin Manufacturers' Association (WMA) is a voluntary association of manufacturing enterprises with operations in Wisconsin. It was founded in 1911 and is now constituted of over 1300 member-enterprises employing over 375,000 people (almost 85%) engaged in manufacturing. The average number of employees per member of the association is under 100.

Since its founding, WMA has represented Wisconsin industries in obtaining equitable rail, air, mail and shipping rates, fair consideration on unemployment and workmen's compensation, taxes, wage and hour and labor-management legislation.

Its interest in the petition *sub judice* stems not only from the natural interest invoked by reason of a member petitioner (Company), but from its long time interest in labor-management affairs, and especially in the promotion of lawful and peaceful settlements to disputes. The strike which befell Petitioner frequently has been the object of sensation-seekings writers' and commentators' efforts—always with mention of Wisconsin industry. The WMA's interest here is to assist in righting two errors in the administration of the National Labor Relations Act which have become manifest in these long proceedings. The effect of such errors, if allowed to stand, will be so far-reaching that the attendant evil will undoubtedly cause a regression in the peaceful resolution of management-labor disputes for years to come.

After a long hearing and review, the Board originally held that striking Kohler employees who were guilty of violent and unlawful activities attendant to the strike were not entitled to reinstatement with back pay upon their offer to return to work, although in the same proceedings the Company was found to have committed violations of §§8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC §151 *et seq.*). 128 NLRB 1062 (1960); J.A. p. 8.

Upon a petition for review to the Court of Appeals for the District of Columbia, the lower court, (Judge Miller dissenting), remanded the matter to the Board with a direct instruction to reweigh the evidence and inferences to be drawn; apply the doctrine of *NLRB* v. *Thayer Co.*, 213 F.(2) 748 (CA.1, 1954), *cert. den.*, 348 U.S. 883, as therein interpreted; and revise its decision accordingly. 300 F.(2) 699 (CADC, 1962); Supp. J.A. pp. 2318 *et seq.*

With new majority personnel constituting the Board, a supplemental decision was then issued by the Board reversing its prior decision and now holding: (a) the strike was an unfair labor practice strike from the outset, and (b) upon balancing the strikers' violent and unlawful activities against the Company's conduct, the 57 strikers were entitled to an offer of reinstatement. 148 NLRB No. 147; Supp. J. A. p. 2339, *et seq.*

Again upon review, the lower court affirmed the Board's Supplemental Decision *per curiam;* Judge Miller again dissenting. App. A to Pet., 58 LRRM 2847.

The Petition for a Writ of Certiorari was filed July 16, 1965, presenting two questions:

1. Did the National Labor Relations Board exceed its authority and the limitations imposed upon it by Sec-

tion 10(c) of the Act in holding that strikers discharged for coercive conduct proscribed by the Act were engaged in an unfair labor practice strike and are entitled to reinstatement with back pay; applying a policy of "balancing" the strikers' illegal conduct against the employer's conduct?

2. May a reviewing court, which has no power to substitute its judgment for that of the Board as to inferences to be drawn from the evidence, nevertheless conclude that the Board "improperly ignored the inferences to be drawn" from evidence which the Board considered and found was "amply refuted" by other evidence—and remand the case to the Board with directions to reweigh the evidence?

This *amicus curiae* brief is addressed to both questions and emphasizes what it considers the errors in the record below from the objective views of industry in general, rather than the partisan views of the parties litigant.

ARGUMENT

A. Status of the Law.

From the earliest development of decisional law under the Wagner Act (49 Stat. 449), a dichotomy of results has been pronounced grounded upon the keystone question as to whether a strike by employees of an employer was for the purpose of (a) enforcing their economic demands, or (b) redressing unfair labor practices alleged to have been committed by the employer. Depending upon a determination of the subjective *raison d'etre,* strikers for the former purpose became known as economic strikers on an economic strike, and the latter, unfair labor practice strikers on an unfair labor practice strike.

Consistent with the legislative purpose in 1935 (and at least in this respect, ever since), an economic striker on an economic strike, upon the settlement of the bargainable issues, returned to his job (as if he had never been on strike), unless he had been permanently replaced during the strike by a new employee. *NLRB* v. *Mackay R. & T. Co.,* 304 U.S. 333 (1938). In other words, the economic striker, by going on strike, risked permanent replacement in the interim as against a successful settlement of the strike. The personal gain of improved wages or working conditions was matched against the employer's ability to find workers in the market at the unimproved rates. Congressional recognition of the status of an economic striker was incorporated into the Act itself in 1959 by the amendments made to §9(c)(3), P.L. 86-257, §702; 29 USC §159(c)(3).

On the other hand, the unfair labor practice striker on an unfair labor practice strike had a superior status to that of the economic striker, for he was said to be effectuating the policies which Congress had adopted to the end that labor-management disputes might be peaceably settled and obstructions to interstate commerce removed. Consequently, even if permanently replaced by a new employee while he was on strike, the unfair labor practice striker was entitled to return to his former employment undiminuted upon his offer to do so, because he was not to be penalized for the action he had taken *pro publico bono. Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956); *NLRB* v. *Mackay R. & T. Co., supra.*

But the question soon arose as to the reinstatement rights of the unfair labor practice striker who tarnished his shining armor by committing illegal acts while on strike. At an early date this Court commenced a sound decisional line in the public interest which held that even where the strike commenced because of an employer's unfair labor practices, a striking employee would be denied reinstatement to his former employment undiminuted upon his offer to return if he was directly or indirectly responsible for seizing and holding the employer's property, violence, wanton and generally uncivil and undefensible activities,[1] and activities which in no event are "protected activities" under §7 of the Act.[2]

---

[1] *NLRB* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939) (employer guilty of interference campaigning for "Company" union, surveillance and refusing to bargain with a majority representative); *NLRB* v. *IBEW,* 346 U.S. 464 (1953) (permanent damage to employer's public image, financial and public relations; extreme disloyalty to employer).

[2] *NLRB* v. *Washington Aluminum Co.,* 370 U.S. 9 (1962).

In *Fansteel* it was urged, as here, that the employer's unfair labor practices constituted sufficient provocation and that the strikers were thereby justified in their illegality. Chief Justice Hughes stopped this argument a-borning:

> "To justify such conduct because of the existence of a labor dispute or of an unfair practice would be to put a premium on resort to force instead of legal principles of law and order which lie at the foundations of society. . . . We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work." *Id*, at pp. 253-255.

Following *Fansteel* and perhaps taking a cue from the dissent of Mr. Justice Reed therein, it was suggested by one writer that the Board and courts should weigh the strikers' misconduct against the provocation furnished by the employer's unfair labor practices before denying reinstatement. See, 52 Harv.L.Rev., 1275, 1326 (1939). This suggestion was criticized by Judge Clark in *McNeely & P. Co.* v. *NLRB*, 106 F.(2) 878, 881 (CA 3, 1939):

> ". . . such latitude of interpretation gives the courts what amounts to legislative power. Maybe they are better qualified to exercise it. It just happens that the draftsmen of our system of government thought not."

To make certain that legislative policy was clear on this point, Congress, in amending the Act in 1947, specifically added:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause." 61 Stat. 146; c.120, Title I, §101 (1947).[3]

This provision became an integral part of §10(c) of the Act as amended.

B. Error of Interpretation and Application of Thayer.

With this background, we come to the decision of the lower court herein to which the petition for the writ is addressed. There the court characterized the *Thayer* decision, *supra,* and in so doing made serious errors. The lower court said, pp. 702-703:

> "Thayer holds that where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act."

---

[3] This amendment was preceded by a less sophisticated proposal which bluntly provided that those employees who engaged in violence would lose all rights under the Act. See, HR 3020, §12(d) as reported and passed by the House of Representatives. 1 Leg. Hist. of Labor-Management Relations Act 1947, pp. 80, 207. It is interesting to note that this provision was dropped by the House Conference Rept. 510, on H.R. 3020 upon the following consideration:

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the Act and are subject to discharge without right of reinstatement. *The right of the employer to discharge an employee for any such reason is protected in specific terms in section* 10(c)." *Id.* p. 563 (emphasis ours)

This is *not* what *Thayer* holds, and a careful review of *Thayer* will show quite to the contrary. In *Thayer* the Court was reviewing a Board decision which had held *inter alia* that the strike was a protected activity within the meaning of §7 of the Act and that therefore, *ipso facto,* the dischargees should be reinstated. *Id.,* at p. 755. The reviewing court did not agree with this legal conclusion and said several times that the rationale of the Board based upon such a premise was erroneous. What *Thayer* then held was that the strike in general was not violent and, while illegal under state law, not illegal under federal law (*i.e.,* protected activity). *Id.,* at p. 756. But, most important, *Thayer* stands fast and consistent with *Fansteel* and the general broad decisional principle that those strikers who engaged in violence and coercive conduct calculated to instill the fear of bodily harm in non-strikers were *not* engaged in "protected activity," not weighable against anything (even "flagrant unfair labor practices"), and, *ipso facto,* not entitled to reinstatement.

Therefore, the first error of the court below is in stating that *Thayer* is directed to "unprotected acts *of misconduct.*" *Thayer* deals mainly in dictum with "unprotected acts" *of good conduct;* where misconduct was involved, reinstatement was denied. Nowhere does *Thayer* even intimate that employees discharged for "only engaging in or directing and controlling the mass picketing, for participating in the home demonstrations, for participating in the employment office picketing, or for combination of such activities"[4] were engaged in a "protected activity."

Secondly, the *Thayer* decision, if it stands at all, must be read in a manner consistent with this Court's pro-

---

[4] 148 NLRB No. 147, at p. ....; Supp. J.A. at p. 2359.

nouncement on the same subject in *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). There, this Court held that a concerted, peaceful walkout in protest of working conditions was protected under §7 of the Act, and that—

> "The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract . . . (or) indefensible. . . ." *Id,* at p. 17.

Thirdly, the majority of the court below in buttressing its inclination to apply its version of the *Thayer* decision cites *Berkshire Knitting Mills,* 46 NLRB 955 (1943), which Congress, during its consideration of the 1947 amendments to the Act, assumed had been overruled and abandoned. See, House Conference Rept. No. 510, on H. R. 3020; 1 Leg. History of the Labor Management Relations Act 1947, pp. 542-543.

Fourthly, even if it can be said that *Thayer* holds that an employee engaged in an unprotected activity can be reinstated solely by virtue of the Board's power to "effectuate the policies of the Act" and without regard to any other direction of the Act or mandate *de hors* the Act, it is submitted that such power could not rationally be exercised where, as here, reinstatement would (could not help but) condone, ratify, reward and approve violations of the policies of the Act.

C. The Principles of Judicial Review.

After directing the Board to apply the lower court's interpretation of *Thayer,* the lower court's majority decision appears to have proceeded to lay out a road map of what would be acceptable as a new set of fact findings upon further review. These new (possible) fact findings would apparently in the view of a majority of the lower court

constitute sufficient provocation by the Company to entitle violent strikers to reinstatement under a quasi-judicial weighing. It is submitted that the lower court exceeded its statutory jurisdiction and duty in this manner of review.

The Court's authority in a review of a Board order is limited:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." §10(e) of the Act, 29 U.S.C. §160(e).

Obviously, this means the Courts of Appeals are not empowered to try a case *de novo* on review. *Osceola Cty. Co-op Creamery Ass'n.* v. *NLRB,* 251 F.(2) 62, 63 (CA 8, 1958); *Victor Mfg. & Gasket Co.* v. *NLRB,* 174 F.(2) 867, 868 (CA 7, 1949). A reviewing court in such case should give due consideration to the special qualifications and expertise of the Board. Only when the court cannot conscientiously find substantial evidence supporting the Board's decision may it set aside the Board decision. *NLRB* v. *Pacific Intermountain Exp. Co.,* 228 F.(2) 170, 171 (CA 8, 1955), *cert. den.* 351 U.S. 952. The court upon review is not permitted to weigh evidence, resolve conflicting inferences, or draw its own inferences from the evidence. *NLRB* v. *Nelson Mfg. Co.,* 326 F.(2) 397, 398 (CA 6, 1964). These propositions have been well established since *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

Measured against these principles, it is submitted that the lower court transcended the pale in that area of its opinion where it reviewed the facts and literally substituted its inferences therefrom for those of the Board. For example, the Board had found that any inference that the

Company's pre-1953 subjective attitudes constituted a continuing inference was dispelled and refuted by two successful negotiations with the Union. The lower court held that this inference was wrong and substituted the inference to the contrary based upon other evidentiary facts, *all of which are discussed somewhere in the Board's decision.* That the Board did not in its written decision specifically refer to every piece of evidence on every major and minor issue is not reason to say it was not considered. What the Board did here and should do in every case is to resolve issues of fact and draw supportable inferences therefrom.

Nor did the lower court fairly view the Board's decision when it said—

> "We conclude that . . . the Board improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954." p. 706.

Plainly, the Board did not ignore the possibility of another inference. The court's own recitation from the Board decision so indicates. A trier of facts does not ignore one inference by inferring another. Where, as here, the Board had inferred one fact from a pattern of facts, the court cannot and should not substitute its own opposite inference from another pattern of facts—and especially where the other pattern of facts was established by the Board from evidence before it and, when weighed, was found insufficient to support the very inference which the reviewing court now substitutes.

The Board's choice of inferences to be drawn, like its determinations of raw facts from conflicting views, may not be set aside by a reviewing court even though the court might justifiably have made a different choice had the

matter been before it as the trier of facts in the first instance. *Martin Sprocket & Gear Co.* v. *NLRB,* 329 F.(2) 417 (CA 5, 1964); *NLRB* v. *Nelson Mfg. Co., supra; Nabors* v. *NLRB,* 323 F.(2) 686, 692 (CA 5, 1963), *cert. den.,* 376 U.S. 911; *NLRB* v. *Marcus Trucking Co.,* 286 F.(2) 583, 589 (CA 2, 1961); and cases cited therein. It is the function of the Board, not the court, to consider the relevant factors and to weigh and evaluate the evidence and draw inferences. If the Board does so and is supported by substantial evidence of record, no court is empowered to overturn its decision. *Dixie Bedding Mfg. Co.* v. *NLRB,* 268 F.(2) 901, 905 (CA 5, 1959); *Victor Mfg. & Gasket Co.* v. *NLRB, supra.*

CONCLUSION

The proceedings below should be reviewed for they establish a substantial departure from time-tested ground rules in the handling of labor-management disputes. No rational employer and no rational union relishes the prospect of a strike. No matter how short the duration, a strike almost certainly involves bitterness affecting morale, customer loss and personal hardship beyond the mere temporary loss of wages. To add to these personal tragedies the gamble that violence may go unpunished and in fact rewarded by a quasi-judicial immunity, is almost like substituting a game of Russian roulette for a legal framework for settlement. Certainty as to what is legal and what is illegal in a strike circumstance is most desirable and the only real hope that disputes will be settled within the framework of Congressional intent.

Here, the appellate court has seemingly departed (without citation) from the axiomatic rule that its inferences from facts cannot be substituted for those of the Board

so long as those of the Board are supported by substantial evidence of record. It is not even suggested by the lower court that the inferences drawn by the Board were not supportable. Regardless of its effect on the present parties litigant, the effect of this new rule of review must be to substantially increase the case load to come to the appellate courts for review from the NLRB. For years it had been thought that where either of two inferences were supportable, the one drawn by the Board would be irrefutable upon appeal. Now, every losing party before the Board will naturally conclude (on the basis of these proceedings) that an appeal is worthwhile because the appellate court may find the opposite inference "more supportable" or "more logical". This result is neither necessary nor is it in the interest of the Board, employers, unions or the judiciary. Heretofore, all parties knew and adhered to the rule on appellate review.

The petition of Kohler Co., it is submitted, should be granted as it raises in a judicially ripe situation an opportunity for this Court to announce definitive principles in the field of labor-management relations which will set firm guide lines inuring to the benefit of the entire country.

Respectfully submitted,

WALTER S. DAVIS
Attorney for Wisconsin Manufacturers' Association, Amicus Curiae

Of Counsel:
O. S. HOEBRECKX
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 10 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EUGENE ADAMS KEENEY
United States Chamber of Commerce
1615 H St., N. W.
Washington, D. C.

GUY FARMER
JOHN A. MCGUINN
Patterson, Belknap & Farmer
1120 Connecticut Ave., N. W.
Washington 36, D. C.

Attorneys for the Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Interest of The Chamber of Commerce	1
The Questions for Certiorari	3
Argument:	
The Misconduct Which the Board Found But Rewarded Was in Violation of the Act and the Law of the State of Wisconsin	7
Practical Significance and Extent of the Board's Action in Rewarding Strikers Who Engage in Coercive Activities	9
The Decision of the Board and Court Below Contravenes the Settled Law of This Court in an Important Issue in the Administration of the Act	11
The So-Called "Thayer Doctrine" is Inapposite	14
An Order Reinstating Strikers Discharged for Violent and Coercive Activities Contravenes the Purposes of the Act	16
An Order Requiring Reinstatements with Back Pay for Strikers Discharged for Violent and Coercive Misconduct Violates Section 10(c) of the Act	18
Conclusion	19

INDEX OF AUTHORITIES

CASES:

American Shipbuilding Co. v. NLRB, 380 U.S. 300	17
Blades Mfg. Co., 144 N.L.R.B. 561 (1963)	15
Carey v. Westinghouse Elec. Corp., 375 U.S. 261	3
Fansteel Metallurgical Corp., 5 N.L.R.B. 930 (1937)	3, 13
Fibreboard Paper Prods. v. Labor Board, 379 U.S. 203	3
International Ass'n of Machinists v. Street, 367 U.S. 740	1

Page

Labor Board v. Fansteel Metallurgical Corp., 306 U.S. 240 ..... 2, 3, 4, 6, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19
NLRB v. Blades Mfg. Co., 59 L.R.R.M. 2210 (8th Cir. 1965) 15
NLRB v. Clearfield Cheese Co., 213 F.2d 770 (3d Cir. 1954) 14
NLRB v. Longview Furniture Co., 206 F.2d 274 (4th Cir. 1953) 14
NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954) cert. denied, 348 U.S. 883 ..... 4, 14, 15
Oneita Knitting Mills, Inc., 153 N.L.R.B. No. 4 (1965) 6
Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 3
Textile Workers v. Lincoln Mills, 353 U.S. 448 3
Thayer Co., 115 N.L.R.B. 1591 (1955) 15
U.A.W. v. Wisconsin Employment Relations Board, 351 U.S. 266 9
W. T. Rawleigh Co. v. NLRB, 190 F.2d 832 (7th Cir. 1951) 14

STATUTES:

National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq.:

Section 1 ..... 18, 19
Section 7 ..... 7, 17, 18
Section 8(b)(1)(A) 18
Section 10(c) 18, 19

MISCELLANEOUS:

Twenty-Ninth Annual Report of the National Labor Relations Board (1964) 9, 10, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The United States Chamber of Commerce supports the Petition for Certiorari filed by the Kohler Company because of the widespread, adverse potential impact of the decision of the Board and Court below on peaceful labor relations throughout industry.[1] The

---

[1] On only one other occasion (*International Ass'n. of Machinists v. Street*, 367 U.S. 740) has the U.S. Chamber of Commerce filed a brief in support of a party's petition for a writ of certiorari.

decision below rewards strikers for engaging in violent and coercive misconduct proscribed by the Act and found to be in violation of the validly imposed law of the State of Wisconsin and thus forecasts a reversion to jungle warfare as opposed to the rule of law in labor disputes.

The Kohler labor dispute and the ensuing litigation before the Board has had a long and highly publicized history. The bitterness and widespread publicity attending this particular labor dispute, however, should not be allowed to obscure the significance and importance of the unprecedented holding by the Board and the Court below in the administration of Federal labor policy.

The Board and Court below have by their holdings given affirmative condonation and encouragement to coercive and unlawful conduct on the part of strikers. This conduct is precisely the type which has since *Fansteel*[2] (twenty-seven years ago) been condemned by this Court, and since 1947 specifically prohibited by the National Labor Relations Act.

This ruling, if allowed to stand, will tend to erode the basic policy of the Labor Act, which is to encourage the use of peaceful procedures in settling disputes, as opposed to resort to violence and coercion. It will add fuel to the fires of industrial strife in contravention of our national labor policy as enacted by Congress and construed by this Court.

Stated in other terms, the decision below represents an attempt to reinstate a rule of lawlessness for strikers in labor disputes first advanced by the Board

---

[2] *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

amidst the labor turmoil of the 1930's in *Fansteel*, when the Board ordered the reinstatement of "sit down" strikers, an order which this Court struck down as directly contravening legislative policy. Since then, Congress in later basic amendments to the Labor Act has reaffirmed and strengthened this legislative policy by specifically prohibiting this type of misconduct by strikers and by expressly forbidding the Board from ordering persons reinstated with back pay who are discharged "for cause".

This Court has in a variety of contexts over this span of time given its decisional imprimatur to peaceful and orderly processes for the conduct and settlement of labor disputes.[3]

The decision below significantly undermines in an important area — the strike and picket line — this salutary legislative and judicial policy.

THE QUESTIONS FOR CERTIORARI

The Kohler petition presents two questions on which certiorari is sought. The Chamber of Commerce supports the request for a review of both questions.

They are, indeed, interrelated and perhaps inseparable. The questions are accurately framed in the Kohler petition and need not be repeated *in haec verba* here. They may be briefly paraphrased as follows:

1. The first question is whether the Board was authorized to order reinstatement and back wages for strikers who *were found* to have engaged in

---

[3] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448; *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Fibreboard Paper Prods.* v. *Labor Board*, 379 U.S. 203; *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261.

violent and coercive conduct proscribed by the Act.

2. The second and related question is whether the Court of Appeals did not exceed its reviewing power by remanding the case to the Board with directions to reweigh the evidence, after refusing to enforce the original Board decision on the stated ground that the Board had "improperly ignored inferences to be drawn from the record", when in fact the Board had weighed the particular evidence to which the Court referred and found it insufficient to overcome the undisputed evidence upon which the Board based its conclusions.

The reason these questions are interrelated is that the Board in the first instance had refused to reinstate the seventy-seven strikers who had been found guilty of misconduct during the strike. This was in accord with the uniform rule since *Fansteel*. The Court below, however, relying solely on some ill-defined dictum in the *Thayer*[4] case in another Court, said that the Board should have "balanced" the wrongdoing of the strikers against the unfair labor practices of the Kohler Company as the determinant for granting or denying reinstatement and back pay. The Court below also found that the Board had "improperly ignored inferences to be drawn" from certain evidence, referring to background evidence of Kohler's pre-1953 labor history and alleged resistance to outside unionism. The Board had reviewed this background and concluded that it was "amply refuted" by the undisputed facts concerning the negotiations and the results of collective bargaining during 1952 and 1953. The Court would not accept this finding, although not holding

[4] *NLRB* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir. 1954), cert. denied, 348 U.S. 883.

that there was a lack of substantial evidence to support it (which is the statutory test for a reviewing Court).

Thus, the Court below remanded to the Board, not merely for the purpose of "balancing" striker misconduct against unfair labor practices, but also to redetermine the date when the unfair labor practices (a refusal to bargain violation) first occurred.

The significance of this is that the Board had originally found that Kohler's violation of the bargaining obligation first occurred on June 1, 1954 (when a unilateral wage increase was found to have been given), and the Court obviously thought that the bargaining violation began at an earlier date. Since most of the strikers' misconduct had occurred prior to June 1, a moving back of the critical date was necessary in order to establish a factual predicate for striking a "balance" as the Court directed.[5]

The second Board (with one member dissenting) reweighed the evidence, and found a refusal to bargain antedating the beginning of the strike, which occurred on April 5, 1954, thus denominating it an unfair labor practice strike from its inception. Having established an employer violation as a predicate, the Board then struck a balance in favor of fifty-seven of the seventy-seven strikers who had individually been found to have engaged in misconduct and had been discharged for that reason. The Board struck a different balance for seventeen of the strikers whose misconduct it felt was

[5] It must be noted that under established law, unfair labor practice strikers have heretofore been held to forfeit their right to reinstatement, as do economic strikers, if they engage in picket line violence or other coercive conduct.

the most flagrant of the group, and sustained their discharge.[6]

When the case was returned to the Court below, the Board decision was affirmed in a *per curiam* opinion.

Even this brief review of the proceedings below is sufficient to demonstrate the importance and the interrelationship of the two questions presented by the Kohler Petition. It was the overreaching of the Court below and its departure from the standards of review that led the Board into its adoption of an unsound principle in direct contravention of a rule of law established by this Court in *Fansteel,* and thereafter followed by the Board and the Courts of Appeals for 27 years.

While the Board's findings were made pursuant to remand, the *Kohler* decision clearly portends a rule of general application in all cases involving unfair labor practice strikers, for in each of them there will exist the elements for "balancing" employer bargaining violations on an imprecise scale against striker misconduct. The decision, therefore, has a potential impact on every bargaining relationship that exists today and on every labor dispute arising therefrom.

The principle applied by the Board and the Court below thus poses a direct threat to the maintenance of

---

[6] Since the judgment appeared to be a purely subjective one, it is difficult to say just where the line was or is to be drawn. In a later case, a Trial Examiner of the Board, with Board approval, has expressed it this way:

> "While the net result of this may be that anything short of aggravated assault will not disqualify such a striker, this policy is deemed binding upon the undersigned". *Oneita Knitting Mills, Inc.,* 153 N.L.R.B. No. 4 (1965).

labor peace throughout industry. It is therefore urged that the Court review the questions presented by the Kohler petition.

ARGUMENT

The Misconduct Which the Board Found But Rewarded Was in Violation of the Act and the Law of the State of Wisconsin

The misconduct engaged in by the fifty-seven strikers ordered reinstated with back pay was concerted, organized and flagrant. Indeed, it was extreme and essentially terroristic. It was directed at nonstrikers, their homes and their families. It was not casual or the result of isolated picket line incidents. Its calculated purpose was to intimidate nonstrikers and prevent them from exercising their Section 7[7] rights to refrain from striking and continue to work at their jobs at the Kohler plant.

The fifty-seven employees ordered reinstated with back pay by the Board were each found to have engaged in some phase of this coercive conduct against nonstrikers. This was not a blanket finding against all strikers and pickets, since there were hundreds involved, but was based on actual proof of individual wrongdoing, consisting of leadership and/or participation in coercive activities.

The conduct in which the fifty-seven strikers engaged falls in one or more of the following categories.

1. Participation in mass picketing by up to 2,500 pickets which shut the Kohler plant "Down like a

[7] Under Section 7 of the Labor Act, the right of employees to refrain from strike activities stands on an equal footing with the right to engage in such strikes.

Drum" for all but three days from April 5 until May 28, 1954. An advance guard of pickets was established to meet nonstrikers and physically block, push, shove and prevent them from entering the plant. Police authority was flaunted and "belly to back" lines were formed to prevent entrance to the plant. Epithets were shouted by the pickets at nonstrikers.

2. Blocking of access to the Kohler employment office, and many instances of large groups of pickets blocking, pushing, shoving, bumping, spitting upon, tripping and punching persons attempting to enter the employment office.

3. Mounting massive and hostile demonstrations in front of the private homes of nonstriking employees. These demonstrations were participated in by from 400 to 700 strikers at a time, and, as described by the Trial Examiner and found by the Board, "they became disgraceful spectacles of mob proportions", characterized by calling nonstrikers vile names, and the hurling of insulting, derisive and threatening epithets.

4. Direction and control of the above stated illegal activities by the union's strike committee.

It is difficult to conceive of more threatening, more coercive, or more flagrant misconduct on the part of strikers and their leaders. It is this type of conduct that the Board and the Courts since *Fansteel* have found disqualify strikers from reinstatement and justify their discharge for cause. Yet it was this conduct which the Board rewarded with a remedial order calling for their reinstatement with back pay, no doubt replacing some of the same employees whose own statutory rights the strikers had threatened and infringed by their terroristic activities.

This is, indeed, the same misconduct by the same strikers that this Court found in *U.A.W.* v. *Wisconsin Employment Relations Board,* 351 U.S. 266, 275, was "violent union conduct", subject to restraint and punishment by the State of Wisconsin and also found to be clearly in violation of the National Labor Relations Act. In its decision relating to this strike, the Court also said:

> "The Kohler Company is subject to the National Labor Relations Act. It seems agreed, and we think correctly in view of the findings of fact, that the alleged conduct of the union in coercing employees in the exercise of their rights is a violation of Section 8(b)(1) of the Act". (Referring to the National Labor Relations Act). 351 U.S. at 270.

The ostensible legal justification for the unprecedented order rewarding these strikers is the resurrection of a presumed rule of balancing the wrongdoing of the strikers against the unfair labor practices of the employer, which has been discredited since the decision of this Court in *Fansteel.*

Practical Significance and Extent of the Board's Action in Rewarding Strikers Who Engage in Coercive Activities

Reinstatement with back pay does not merely condone coercive conduct. It constitutes a direct inducement to such activity on the part of strikers. Every labor dispute, such as this one, involves a potential strike and a potential charge that the strike was caused by unfair labor practices.[8] Since there are thousands

[8] In fiscal 1964 some 10,695 charges were filed with the Board alleging employer unfair labor practices. Twenty-Ninth Annual Report of the National Labor Relations Board (1964), p. 7.

of labor contracts negotiated throughout industry generally each year, there will be countless disputes in which the ruling of the Board and the Court below will have a potential application.

It is an increasingly common practice for unions to file unfair labor practice charges when a bargaining impasse arises, sometimes because they believe they have merit and sometimes for strategic reasons.[9] In the subjective view of the strikers, these charges always have merit. If the Board decides that they have merit, and if the Board, in its subjective analysis after the fact, decides that the employer's wrongdoing overbalances the wrongdoing of the strikers, the strikers will win reinstatement with back pay. The application of such a primitive rule of "an eye for an eye and a tooth for a tooth" can only serve to increase the tensions in labor disputes and encourage resort to force and violence on the picket line.

The "weighing" process implicit in this ruling itself is totally impractical to administer on any basis having a semblance of objectivity. The repeated use of the adjectives "flagrant" and "deliberate" by the Board in describing its apparently personal reaction to Kohler's labor relations policy over the past thirty-five years is an indication of the total subjectivity as well as the lack of any tangible guidelines in the Board's ruling. As demonstrated so poignantly in this case, the same facts that were regarded by the second

---

[9] In its 1964 Annual Report the Board stated:

"A considerable increase also was noted in refusal-to-bargain charges against employers in 1964. There were 3,088 such allegations, 504 more than the 2,584 of 1963, or in excess of 19 percent above the prior year". Twenty-Ninth Annual Report of the National Labor Relations Board (1964), p. 8.

Board as constituting a flagrant and deliberate unfair labor practice causing a strike and excusing coercive and unlawful conduct by strikers were regarded by the first Board as not even sufficient to establish *any* employer unfair labor practice prior to the strike.[10]

The "rule" thus fashioned is not a rule at all. It evokes merely the emotional reaction of a particular Board in balancing wrongdoing to determine whether the wrongs of one party are sufficiently serious to warrant rewarding the wrongs of the other party. Under such a rule, it would be equally logical, and equally destructive of the purposes of the Act to strike a different balance and hold that the flagrant conduct of the Union and the strikers in this case outweighed Kohler's alleged unfair labor practices, a rule which would presumably relieve Kohler of its obligation to bargain. The Board has no right to view its discretion so broadly as to enforce the law as between two wrongdoers on a "winner take all" basis.

The Decision of the Board and Court Below Contravenes the Settled Law of This Court on an Important Issue in the Administration of the Act

The result of the litigation below constitutes the first administrative and judicial finding (since the original erroneous finding of the Board struck down by the Court in *Fansteel*) that strikers who engage in

---

[10] The original Board decision found that the strike commencing on April 5, 1954, was an economic strike at its inception and was converted to an unfair labor practice strike only on June 1, 1954, thus negating the "flagrant" and "deliberate" gloss put on Kohler's conduct by the Board in its Supplemental Decision, where the same facts were found to have resulted in an unfair labor practice strike on April 5, 1954. Indeed, dissenting Judge Miller would have found that the strike was economic in its inception and never became an unfair labor practice strike.

coercive conduct in violation of the Act can be rewarded with reinstatement and back pay.

Since *Fansteel,* and prior to this case, the uniform Board and Court interpretation has been that strikers who engage in coercive conduct in violation of the labor statute forfeit their right to reinstatement, and this rule has applied equally to economic and unfair labor practice strikes, i.e., strikes caused by employer unfair labor practices. Never before has it been held that antecedent or concurrent employer unfair labor practices serve to exonerate strikers from the consequences of their own coercive conduct.

The important issue posed is one practically as old as the National Labor Relations Act itself and definitely settled by this Court in 1938 in *Fansteel.* There the Board found, with this Court's approval, that the employer was guilty of introducing a company-dominated union to defeat a labor organization, had engaged in unlawful surveillance by use of a "labor spy" and had absolutely refused to meet and bargain with the Union. The Board, however, had also found that strikers discharged for a subsequent "sit down strike" and other activities in support of the sit down strike, which were found to violate the validly imposed law of the State of Illinois, should be reinstated with back wages. The Board in that case had held:

> "It is contended that the conduct of the strikers in engaging in the sit-down strike and in refusing to vacate the buildings in response to the injunction, relieves the respondent of any obligation toward the participants, including those who brought supplies to the men in the plant. In making this contention, however, the respondent does not come before the Board with clean hands. On the contrary, as we have found above, the

> respondent is guilty of gross violations of law, violations which in fact were the moving cause for the conduct of the employees". *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 949.

It was this strikingly parallel reasoning that this Court expressly disavowed in the *Fansteel* case, stating:

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society". 306 U.S. at 253.

The Court thus held:

> "We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure". 306 U.S. at 258.

The Court also stated that to hold that the misconduct violated validly imposed State law, but deny the employer the right to discharge for such misconduct "would be to create an anomolous distinction for which there is no warrant . . .". 306 U.S. at 254.

No valid distinction can be drawn between the striker misconduct involved in the *Fansteel* case and the striker misconduct in the present case. In both cases the misconduct was found to be in violation of valid State law and was enjoined and punished under such law. That the coercive and violent misconduct of the strikers in the present case was directed more

against fellow employees and their families rather than the property rights of the employer only magnifies the enormity of the Board's error and demonstrates the importance and broad impact of the case on employers and employees alike.

The *Fansteel* rule has been consistently followed by every Court of Appeals before which this issue has been raised, with the exception of the present case, to bar reinstatement with back pay of strikers who engage in coercive, illegal or unprotected conduct during the course of an unfair labor practice strike.[11]

The So-Called "Thayer Doctrine" Is Inapposite

The Court below first suggested and the Board then sought to justify its reinstatement and back pay order by reference to the so-called "*Thayer* doctrine".

In judging the relevance of *Thayer* to this case it is significant that in the *Thayer* case both the Court and the Board were careful not to infringe upon this Court's ruling in the *Fansteel* case. The Court in *Thayer* merely laid down the abstract rule that:

> "where collective action is precipitated by an unfair labor practice, a finding that that action is not protected under § 7 does not, *ipso facto,* preclude an order reinstating employees who have been discharged because of their participation in the unprotected activity". 213 F. 2d at 753.

---

[11] *NLRB* v. *Clearfield Cheese Co.,* 213 F. 2d 70 (3d Cir. 1954) (mass picketing); *NLRB* v. *Longview Furniture Co.,* 206 F. 2d 274 (4th Cir. 1953) (concerted use of profane and indecent language to prevent nonstrikers from working); *W. T. Rawleigh Co.* v. *NLRB,* 190 F. 2d 832 (7th Cir. 1951) ("breast to back" mass picketing).

The present case does not involve the validity or invalidity of this broad, negatively stated dictum.[12]

In contrast to striker conduct that was peaceful although unprotected in *Thayer*, what is involved here is *violent and coercive* conduct and the issue is whether the Board may reward violent and unlawful conduct with reinstatement and back pay. That is a *Fansteel* not a *Thayer* question.[13]

---

[12] It is worthy of note, moreover, that on the remand of Thayer the Board refused to reinstate strikers who had engaged in conduct described by the Board as "visits by carloads of strikers to the homes of nonstrikers . . .". *H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1593 (1955). Both the Board and the Court in Thayer found such conduct to be "coercive in nature and calculated to instill fear of physical harm in the non-striker victims". 213 F. 2d at 757, 115 N.L.R.B. at 1593.

[13] Prior to this case, the Board had, itself, given only a narrow and limited scope to Thayer. Thus, in its 1964 Annual Report the Board reported, under a section discussing decisions which "involved novel questions and set precedents", its *Blades Mfg. Corp.* decision, 144 N.L.R.B. 561 (1963). The Board stated:

> "The Board held that under the circumstances it would apply *Thayer* even assuming the dischargees had engaged in a planned series of work stoppages involving partial or intermittent strike activity which was unprotected. However, the conduct of the employer was found to be in flagrant disregard of the employees' rights and of the rights of the union as their exclusive bargaining representative. In contrast the strike activity of the dischargees was *peaceful, not in violation of the law*, and there was no showing that the dischargees' activity caused any greater damage to the employer's business than a concededly protected strike would have". Twenty-Ninth Ann. Report of the NLRB, p. 102. (Emphasis added).

Ironically, *Blades* was reversed by the Court of Appeals for the Eighth Circuit on the ground that there was no substantial evidence to support the Board's finding of an employer unfair labor practice, "flagrant" or otherwise. *NLRB* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (8th Cir. 1965).

An Order Reinstating Strikers Discharged for Violent and Coercive Activities Contravenes the Purposes of the Act

As was true in *Fansteel,*[14] the major justification of the Board and the Court below in ordering reinstatement with back pay for employees discharged for violent and coercive conduct is that such remedial order is necessary to "effectuate the policies of the Act".[15]

This is a transparent makeweight argument. For thirty years, the Board and the Courts have regarded a Court enforced order to bargain as an adequate and appropriate remedy for a violation of the bargaining obligation. Such an order was entered and enforced against Kohler in this case. In addition, all strikers, except for the seventy-seven engaging in unlawful conduct, have been ordered reinstated, thus preserving the Union's membership virtually intact. The argument can hardly be made that the discharges of the seventy-seven employees involved in violent and coercive conduct tends to weaken or destroy the Union. In fact, the purging from the Union of its lawless elements would appear to strengthen it as an instrument of employee representation. There is, thus, no necessity to reinstate these employees in order to prevent Kohler from "benefiting" from its unfair labor practices.

As this Court said in *Fansteel*:

> "The authority to require affirmative action to 'effectuate the policies' of the Act is broad but not

---

[14] The Court in Fansteel stated:

> "The contentions of the Board in substance are these: . . .
>
> "(3) That the Board was entitled to order reinstatement or reemployment in order to 'effectuate the policies' of the Act". 306 U.S. at 252-253.

[15] Supp. J. A., pp. 2322, 2366.

> unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. . . . [T]he authority to order affirmative action [does] not go so far as to confer a punitive jurisdiction enabling the Board to inflict on the employer any penalty it may choose because he is engaged in unfair labor pactices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order". 306 U.S. 257.[16]

No argument is made or can be made that the activities for which these persons were discharged were protected activities within the meaning of Section 7 of the Act. Yet, it is elementary that the reinstatement with back pay order of the Board protects only persons who have been unlawfully deprived of rights guaranteed by Section 7 of the Act.

Moreover, the Board's remedial order in this case directly contravenes the following stated affirmative policies of the Act which emphasize resort to peaceful procedures and conduct in the course of a labor dispute.

---

[16] This Court in *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 has recently reiterated its criticism of the Board for seeking to define national labor relations policy in terms of its own assessment of the relative economic power of the adversaries in the bargaining process rather than following the Congressional mandate. There this Court said:

> "[W]e think the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management". 380 U.S. at 316.

Certainly the "balancing" of wrongdoing ordered by the Court below and indulged in by the Board is precisely the type of overly expansive construction of the Board's functions condemned by this Court.

1. The policy to avoid "industrial strife" through all parties' recognition "under law" of the legitimate rights of other parties and the policy of providing "orderly and peaceful procedures" to insure and protect such legitimate rights. (Section 1(a) of the Act).
2. The protected right of employees "to refrain from" engaging in concerted activities, such as striking and picketing. (Section 7 of the Act).
3. The proscription against unions from restraining or coercing employees in the exercise of their legitimate rights guaranteed by Section 7. (Section 8(b)(1)(A) of the Act).

As stated by this Court in *Fansteel*:

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights". 306 U.S. at 257-258.

An Order Requiring Reinstatement With Back Pay for Strikers Discharged for Violent and Coercive Misconduct Violates Section 10(c) of the Act

The fifty-seven strikers ordered reinstated with back pay by the Board and Court below were discharged for their individually proven leadership or participation in coercive activities, and the first Board found that Kohler had sufficient cause to discharge them. The Board, having made this finding, was precluded by express statutory proscription from ordering their reinstatement.

Congress in 1947 amended the Act to provide:

> "No order of the Board shall require the reinstatement of any individual as an employee who has

> been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause". (Section 10(c)).

That amendment to the Act placed an added restriction on the Board in its framing of remedial orders and constituted a legislative affirmation of the principle of the *Fansteel* case.

It is, therefore, unprecedented that the Court below should hold in its first opinion in this case that:

> "[W]e cannot say that § 10(c) would prevent the Board from ordering reinstatement if it were to find that to do so would effectuate the policies of the Act". 300 F. 2d at 705.

This holding ignores Congressional policy stated in Section 10(c) and conflicts with the heretofore uniform rulings of this Court and all federal courts that organized violent and coercive misconduct of the strikers, directed largely against defenseless employees and their families, may not be rewarded with reinstatement and back pay.

CONCLUSION

For the reasons specified above the Chamber of Commerce urges this Court to grant the petition for certiorari to consider the questions presented by Petitioner, which have a transcendent importance to American industry and will determine whether labor relations in this country will be permitted to revert to a primitive and by-gone era of violence and coercion or will be found to have entered that era of maturity envisaged by the Act wherein:

> "employers, employees, and labor organizations each recognize under law one another's legitimate

rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest". (Section 1(a) of the Act).

Respectfully submitted,

EUGENE ADAMS KEENEY
United States Chamber of Commerce
1615 H Street, N. W.
Washington 5, D. C.

GUY FARMER
JOHN A. MCGUINN
Patterson, Belknap & Farmer
1120 Connecticut Avenue, N. W.
Washington 36, D. C.

Attorneys for the Amicus Curiae

Office-Supreme Court, U.S.
FILED
AUG 10 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER
General Counsel

FRED B. HAUGHT
Assistant Counsel
918-16th Street, N. W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Interest of *Amicus Curiae*	2
Argument	3
Conclusion	10

AUTHORITIES CITED

CASES:

American Ship Building Company v. NLRB, 380 U.S. 300	7
Kohler Co., 128 NLRB 1062	4
NLRB v. Brown, 380 U.S. 278	7
NLRB v. Fansteel Metallurgical Corporation, 306 U.S. 240	5, 6, 8
Oneita Knitting Mills, Inc., 153 NLRB No. 4	7
Quality Limestone Products, Inc., 153 NLRB No. 93	8

STATUTES:

Labor Management Relations Act, 1947, Declaration of Policy, 61 Stat. 136, 29 U.S.C. Sec. 141	6
National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151 et seq.	
Section 10(b)	9
Section 10(c)	6

COMMITTEE REPORTS:

House Conference Report No. 510 on H.R. 3020	6, 7, 8
House Report No. 245 on H.R. 3020	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of this Court, and with consent of the parties, the National Association of Manufacturers of the United States of America respectfully presents this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises, located throughout the United States and its territories. These concerns range from the very small to the very large and represent about 75 percent of the industrial employment in the United States. Most of these business enterprises engage in interstate commerce and are therefore subject to the provisions of the National Labor Relations Act, and their industrial relations are affected by the policies of that Act and decisions made thereunder.

The Association has an interest in this case by reason of the substantial effect, both immediate and potential, that the decision of the Court of Appeals for the District of Columbia Circuit will have upon the Association's members. The Association seeks to emphasize the far-reaching effect of this decision, to point out its serious impact upon industrial relations, community relations, and the maintenance of law and order in all communities where the Association's members are in business. It also seeks to demonstrate that the decision is inconsistent with the purposes and policies of the National Labor Relations Act.

The first question presented by the petition in this case relates to the right of an employer to discharge employees for engaging in assaults and other violence, mass picketing, blocking access to the employer's premises, mob demonstrations at the homes of non-strikers, and other illegal, improper, and unprotected conduct

in connection with a labor dispute. It is on this question that the Association believes it can make a special contribution as *amicus curiae*. Limitation of this brief to the first question, however, is not intended to detract from the importance and merit of the second question presented in the petition which we believe also merits review by this Court.

ARGUMENT

This case arises from a strike at Kohler Co. which began in 1954 and extended over several years. The company discharged 90 employees for directing, controlling, and engaging in acts of violence, aggravated incidents of mass picketing at the plant, mob demonstrations and threats at the homes of non-striking employees, and similar improper conduct. The National Labor Relations Board found that these employees had engaged in such conduct and were discharged for that reason. Accordingly, it denied them reinstatement.

On remand from the Court of Appeals for the District of Columbia Circuit, the Board was still of the view that these employees had engaged in such conduct and were discharged for that reason, but it ordered most of them reinstated on the "balancing" of conduct theory suggested by the Court of Appeals in its decision remanding the case.

The Board broadly ordered reinstatement of employees who had engaged in various types of misconduct, in two groups as set forth below.

1. The Board ordered reinstatement of those "who were discharged only for engaging in or directing and controlling the mass picketing, for participating in the

home demonstrations, for participating in the employment office picketing, or for a combination of such activities." (Supp. J.A. 2359)

The mass picketing referred to had been described by the Board in its earlier decision as "conduct that has been commonly called 'belly to back' picketing" which was "effective in preventing ingress to or egress from the plant," and during which "in many instances the pickets refused to permit entrance to the plant property despite requests of the police to let the workers into the plant." (*Kohler Co.*, 128 NLRB 1062, at 1103)

The home demonstrations referred to had been described by the Board in its earlier decision as "disgraceful spectacles of mob proportions, with as many as 400, 500, and even 700 persons assembled" at the homes of non-strikers, during which "vile names and insults, derisive epithets, and even threats were shouted out at them." (128 NLRB at 1106)

The employment office picketing referred to had been described by the Board in its earlier decision as conduct in which the pickets would repeatedly "interpose themselves between the approaching applicants and the entrance to the employment office" so as to prevent access. The Board also found that "Frequently there were instances when groups of pickets actively blocked, pushed, shoved, bumped, spat upon, tripped, kicked, and otherwise impeded the entrance of persons into the employment office." (128 NLRB at 1107)

2. The Board also ordered reinstatement of those "(1) actively engaging in halting, encircling, blocking, shouldering, and bumping of nonstrikers or job applicants during the mass picketing or employment office picketing; (2) verbally harassing, insulting, and abus-

ing nonstrikers at the picket line, their homes, business establishments, or places of amusement; (3) participating in inspecting railroad cars leaving Respondent's plant or attempting temporarily to halt certain trucks leaving Respondent's plant." (Supp. J.A. 2360-2361)

The only employees denied reinstatement by the Board were 17 strikers who engaged in "physically and violently assaulting nonstrikers or threatening members of nonstrikers' families." (Supp. J.A. 2360, 2366) The Board reasoned that it should not enter a reinstatement order as to these employees because of "the encouragement such misconduct would receive, with the possible disorder and instability which such encouragement might induce in collective bargaining, were we to order them reinstated. Accordingly, we find that it would not effectuate the policies of the Act to reinstate those strikers who engaged in the above-described acts of violence or threats of physical harm." (Supp. J.A. 2366)

From the time of this Court's decision in *NLRB* v. *Fansteel Metallurgical Corporation,* 306 U.S. 240 (1939) up to the present case, it has been uniformly held by the Board and the courts that illegal, tortious and improper conduct of the kind engaged in by the 90 employees involved here is cause for discharge even when committed in the course of concerted activity in a labor dispute and precludes an order of reinstatement. The leading cases are cited in the Petition in the present case and are not repeated here. This long line of holdings was based on the sound premise that it is the policy of the National Labor Relations Act to provide peaceful and orderly means of settlement of labor disputes as a substitute for the use of force and

violence and other illegal conduct. As this Court put it in the *Fansteel* case:

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights." 306 U.S. at 257-258.

This policy was reiterated and emphasized by Congress in the Labor Management Relations Act, 1947. That Act's Declaration of Policy states that employers, employees, and labor organizations must "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." It further declares that "It is the purpose and policy of this Act . . . to provide orderly and peaceful procedures . . . and to protect the rights of the public."

The 1947 Act further reinforced this policy by adding a new provision in Section 10(c) of the National Labor Relations Act that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." As explained in the House Conference Report (Report No. 510 on H.R. 3020, p. 59, Legislative History of the Labor Management Relations Act, 1947, p. 563), the cause for discharge referred to in this provision included "violence, mass picketing, unfair labor practices, contract violations or other improper conduct" and the provision "applies with equal force whether or not the acts constituting the cause for discharge were

committed in connection with a concerted activity." Ibid., Report p. 39, Legislative History, p. 543.

In departing from the policy of the Act in the present case, the Board adopted a new and different policy—a sort of "comparative negligence" doctrine—of balancing the conduct of one party against that of the other. It said "we have carefully balanced or weighed" the employees' conduct against the company's conduct and "we conclude that the latter outweighs the former." (Supp. J.A. 2358) This is another instance of usurpation by the Board of "authority to define national labor policy by balancing the competing interests of labor and management" and of making "a judgment as to the proper balance to be struck between conflicting interests . . . which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress" which this Court recently condemned in *American Ship Building Company* v. *NLRB,* 380 U.S. 300, and *NLRB* v. *Brown,* 380 U.S. 278.

Even in making this departure, the Board still recognized that it lends "encouragement" to employee misconduct "with the possible disorder and instability which such encouragement might induce." (Supp. J.A. 2366) In this case and in *Oneita Knitting Mills, Inc.,* 153 NLRB No. 4, decided subsequently, it apparently considered it proper to encourage and condone any misconduct less than "aggravated assault." In the *Oneita* case it was suggested by the Trial Examiner, whose findings, conclusions, and recommendations were adopted by the Board, that the line might be drawn at "homicide or mayhem." Trial Examiner's Decision, p. 16, line 24.

In an even more recent decision, the Board made it clear that it now considers this new doctrine "well-

settled" and intends to follow it in future cases. Thus it stated, "It is well-settled that employees who strike as a result of an employer's unfair labor practices are entitled to have any unprotected conduct which they may have engaged in during the course of such a strike balanced or weighed against the employer's unlawful conduct which provoked or, as here, prolonged their strike. *N.L.R.B.* v. *Thayer Company,* 99 NLRB 1122, 1125, enfd. as modified, 213 F. 2d 748 (C.A. 1), cert. denied 348 U.S. 883; *Kohler Co.,* 148 NLRB No. 147." *Quality Limestone Products, Inc.,* 153 NLRB No. 93, released July 4, 1965.

This apparently represents a return to an early Board doctrine which was expressly repudiated by Congress in 1947—a doctrine under which "the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement." House Conference Report No. 510 on H.R. 3020, p. 39, Legislative History of the Labor Management Relations Act, 1947, p. 543.

This new policy not only exceeds the Board's authority; it would be wrong even if it were within the Board's authority because it encourages the very "resort to force and violence in defiance of the law of the land" which this Court condemned in the *Fansteel* case.

The Board's new policy of balancing conduct puts aside the orderly processes of the law and encourages the parties to disregard the peaceful procedures provided by law and resort to retaliatory actions meeting violation with violation, force with force, and violence with violence. That is not in accord with the National Labor Relations Act or any other law of the land.

It is a matter of common knowledge that it is difficult at best for state and local police authorities to maintain law and order during strikes, picketing and other labor disputes. Local authorities deserve every help and cooperation from the Federal law which has preempted the field of labor relations. They do not deserve the sabotaging effects of the policy adopted by the Board in this case which lends encouragement to mass picketing, mob demonstrations, disorderly conduct and violence.

The Board's new policy of balancing conduct, as practiced in the present case, also seems to introduce elements of staleness that contravene at least the spirit of the six-month limitation on the issuance of unfair labor practice complaints which Congress added in Section 10(b) of the Act in 1947. Congress was concerned that matters were being brought up "years after an unfair labor practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." House Report No. 245 on H.R. 3020, p. 40, Legislative History of the Labor Management Relations Act, 1947, p. 331. In its initial consideration of the present case on an identical record, the Board was unable to discern any unfair labor practice by the company that would make the strike an unfair labor practice strike from the beginning. In its Supplemental Decision on remand, it had to go back to labor strife as early as 1933, two years before the National Labor Relations Act was enacted, to find support for finding an unfair labor practice in 1954 to justify reinstatement of employees discharged for misconduct in 1955. Thus, the doctrine seeks to perpetuate the effects of labor disputes rather than to put them to rest as Congress intended.

Employers have a genuine interest in developing and maintaining good employee relations, good community relations, and good industrial climate in the communities where they operate. The Board's new policy is in derogation of an employer's right to maintain order and discipline, since it throws a cloak of immunity over unlawful and improper conduct of employees if committed in connection with concerted activity, and prevents discharge for such conduct. It is in derogation of an employer's right to operate during a strike, since it permits pickets to prevent workers from entering the plant. It is in derogation of the right of individual workers who may wish to refrain from striking and continue to work. It induces lawlessness and disorder in the community and affects not only the ability of the employer to operate in the community, but also the reputation of the community and the employer.

CONCLUSION

The decisions of the Board and the lower court in this case adopt a new labor relations policy that is inconsistent with the intent of Congress and the provisions of the National Labor Relations Act, conflicts with the decisions of this Court and other courts, exceeds the authority of the Board and the lower court, and has far-reaching effects upon the labor relations of industry generally.

We therefore respectfully urge that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER
General Counsel

FRED B. HAUGHT
Assistant Counsel
918-16th Street, N. W.
Washington, D. C. 20006

August, 1965

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
B. The initial decisions of the Board and the court of appeals	16
C. The supplemental decisions of the Board and the court of appeals	19
Argument	21
Conclusion	26

CITATIONS

Cases:

Auto Workers v. *Wisconsin Board*, 351 U.S. 266	12
International Ladies' Garment Workers' Union v. *National Labor Relations Board*, 237 F. 2d 545	24
Kohler Co., 108 NLRB 207, enforced, *National Labor Relations Board* v. *Kohler Company*, 220 F. 2d 3	3
Kohler Co. v. *National Labor Relations Board*, 300 F. 2d 699	22
National Labor Relations Board v. *Blades Mfg. Corp.*, 344 F. 2d 998	24
National Labor Relations Board v. *Clearfield Cheese Co.*, 213 F. 2d 70	24
National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U.S. 240	23

784-099—65——1

Cases—Continued

	Page
National Labor Relations Board v. *Ford Radio & Mica Corp.*, 258 F. 2d 457	24
National Labor Relations Board v. *Longview Furniture Co.*, 206 F. 2d 274	23
National Labor Relations Board v. *Puerto Rico Rayon Mills*, 293 F. 2d 941	22
National Labor Relations Board v. *Thayer Co.*, 213 F. 2d 748, certiorari denied, 348 U.S. 883	21, 22, 24
National Labor Relations Board v. *Wallick*, 198 F. 2d 477	22
National Labor Relations Board v. *Wichita Television Corp.*, 277 F. 2d 579, certiorari denied, 364 U.S. 871	22
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	26
W. T. Rawleigh Co. v. *National Labor Relations Board*, 190 F. 2d 832	24

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	16, 17
Section 8(a)(3)	17
Section 8(a)(5)	16
Section 10(c)	22, 24

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 833, UAW–AFL–CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Supp. J.A. 2318–2339)[1] is reported at 300 F. 2d 699. Its second opinion (Pet. 38–39) is reported at 345 F. 2d 748.

[1] "J.A." refers to the Joint Appendix printed for the use of court below in the first proceeding, and used in both proceedings. "Supp. J.A." refers to the Supplemental Joint Appendix, which was printed for the use of the court below in the later proceeding and is paginated consecutively with the Joint Appendix. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

The initial decision and order of the Board (J.A. 8–412) are reported at 128 NLRB 1062. Its supplemental decision and order (Supp. J.A. 2339–2378) are reported at 148 NLRB 1434.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1965 (Pet. 38–39). The petition for a writ of certiorari was filed on July 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, where strikers have been discharged for misconduct in connection with an unfair labor practice strike, the Board may order the strikers reinstated with back pay, if such remedy is necessary to effectuate the policies of the National Labor Relations Act.

2. Whether the court of appeals exceeded its reviewing authority in remanding the first proceeding to the National Labor Relations Board to reconsider whether a strike among the Company's employees was an unfair labor practice strike from its inception.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*), are set forth at pp. 39–40 of the petition for certiorari.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE COMPANY'S LABOR POLICY PRIOR TO THE UNION'S CERTIFICATION

In 1952, Local 833, UAW–AFL–CIO, the respondent Union, was certified by the Board as the exclusive bargaining representative of petitioner Kohler's production and maintenance employees (J.A. 129–130). For almost 20 years prior thereto, the employees had been represented by the Kohler Workers Association. Kohler instigated the formation of the KWA as a means of combating the organizational efforts of the AFL,[2] and it was in effect a "Company dominated" labor organization (Supp. J.A. 2343–2345).

In 1950, the Union began a campaign to displace the KWA as the employees' bargaining representative, but it lost a Board election to the KWA, which was aided by the Company (Supp. J.A. 2345; J.A. 884–885). In the summer of 1951, the Union continued its effort to organize the employees. The Company countered by engaging in conduct which the Board found to constitute unfair labor practices.[3] Thus, Company officials instructed supervisors to find any Union adherents in their departments and to seek out pretexts for effecting their discriminatory discharge. Company supervisors threatened to discharge or take other reprisals against Union adherents, offered bene-

---

[2] The Company repulsed the AFL in 1934, in a violent struggle which involved the use of tear gas and the State militia against the strikers (Supp. J.A. 2343).

[3] See *Kohler Co.*, 108 NLRB 207, enforced in *National Labor Relations Board* v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7).

fits to employees who abandoned the Union, and warned an employee that he "was under surveillance by roving guards." And the Company discharged an employee for his union activity. (Supp. J.A. 2345–2346.)

On April 4, 1952, the Union filed a representation petition with the Board covering the Company's production and maintenance employees (Supp. J.A. 2346). The KWA membership voted to affiliate with the Union. The Company, charging that this action resulted from the "double dealing" of KWA officials, began refusing to entertain grievances from KWA stewards, and withdrew other KWA privileges (Supp. J.A. 2346–2347). In addition, the Company attacked the Union as an organization that was "quick to resort to force," wanted to "create" employer-union hostility, and was a threat to "17 years of industrial peace" (Supp. J.A. 2347; J.A. 838, 1325–1336, 1339–1340, 2272–2277, 2282–2291).

Notwithstanding the Company's anti-union campaign, the Union won the election held on June 10 and 11, 1952, and was certified by the Board (Supp. J.A. 2347; 2181–2182). Immediately thereafter, the Company withdrew the last forms of assistance which the KWA had received (Supp. J.A. 2347; 2502–2503).

2. EXECUTION AND ADMINISTRATION OF THE 1953 CONTRACTS

The KWA had begun contract negotiations late in 1951, but had been unable to reach any agreement with the Company to replace the existing contract which expired on January 30, 1952 (Supp. J.A. 2347; J.A. 2263–2264). In August 1952 the Union supplanted the KWA at the bargaining table and contract talks re-

sumed (Supp. J.A. 2347; J.A. 1051). No agreement having been reached by the middle of February 1953, the employees authorized the Union to call a strike (Supp. J.A. 2347; J.A. 1050, 2208–2209). Anticipating a walkout, the Company had made plans to quarter on the premises a large "plant protection" force, comprised in part of regular supervisory personnel, which would keep an around-the-clock vigil (J.A. 1049–1051).* However, no strike occurred, because on March 1, 1953, after the intervention of government mediation and conciliation services and the issuance of the Board complaint with respect to the Company's earlier unfair labor practices (n. 3, p. 3, *supra*), the Company agreed to its first contract with an "outside" union (Supp. J.A. 2347; 2387–2437, J.A. 1050).

On May 23, 1953, pursuant to a 3-months' wage reopening clause in the contract, the Union requested a wage renegotiation (Supp. J.A. 2348; J.A. 1102). These talks also proved fruitless until the employees again voted to authorize a strike and both the Company and the Union again initiated strike preparations similar to those undertaken earlier in the year (Supp. J.A. 2348; 2510, J.A. 1048–1058, 1066–1067). On August 20 the parties executed a supple-

---

*Thus, the Company brought about 300 cots into the plant, made arrangements for the delivery of special stockpiles of coal and food, erected five or six watch towers on the roofs of various Company buildings, and purchased 8 twelve-gauge shotguns with 500 rounds of ammunition and tear gas guns with 75 rounds (Supp. J.A. 2347–2348; J.A. 1049–1058, 1066–1067). The Union, for its part, had set up a soup kitchen and rest room facilities and brought in sound trucks (J.A. 13; 2208–2209).

mental agreement providing for a 3-cent wage increase. This agreement also provided for a joint committee to study and to negotiate about inequities in the wage structure. (Supp. J.A. 2349–2350; 2501–2502.)

In October 1953, the Union notified the Company that it wanted to negotiate regarding wage inequities, and requested the Company to supply it with the average incentive earnings on operations involving some 65 percent of the unit employees in order to enable the Union to formulate a proposal (Supp. J.A. 2350; J.A. 544–545, 582, 1197, 1566). Some two months later the Company supplied a small portion of this information, regarding the pottery division (Supp. J.A. 2350; 2511–2512, J.A. 582, 1359, 1567). However, it failed to supply information with respect to the enamelware division until August 1954 (10 months after the Union's initial request), notwithstanding Company Attorney Lyman Conger's representation to the Union, in February 1954, that such information was presently on his desk; and it never supplied the information pertaining to other divisions, notwithstanding the Union's repeated requests (Supp. J.A. 2350, J.A. 21–23, 150; 546–547, 568, 582–583, 591–592, 810–811, 1531–1536, 1566–1569, 1586–1588, 2102). As the Union pointed out to the Company, it was impossible for the Union to present any common-sense plan on inequities without the incentive-earnings information (Supp. J.A. 2350; J.A. 592, 1586).

Meanwhile, the incentive workers in the brass die casting department were complaining to the Union that subsequently imposed artificial limitations had

nullified the wage increase purportedly given them by the 1953 contract and its supplement (Supp. J.A. 2350, J.A. 23; 1537–1539, 1560, 1569–1570). When the Company expressed doubt as to the truth of this allegation, the Union asked for the average earnings of the incentive workers in the brass die department for the last three months of 1952 and the last three months of 1953 (Supp. J.A. 2350, J.A. 23; 1558–1559, 1569–1570, 1536–1538, 2036). The Company never supplied this information (Supp. J.A. 2350, J.A. 23; 886–887, 905, 1105–1106).

The 1953 contract provided for a grievance procedure (Supp. J.A. 2391–2398). However, Attorney Conger frequently disparaged those employees who attempted to utilize this procedure by referring to them as "malingerers and finaglers" (Supp. J.A. 2351; J.A. 1594–1595, 891–893). The Company manifested such an uncooperative attitude toward the whole grievance procedure that many employees felt it useless to submit grievances, and the Union found it difficult to persuade employees to serve as job grievance stewards (Supp. J.A. 2351; J.A. 454). Moreover, before and during the negotiations which preceded the 1954 strike (pp. 8–12, *infra*) the Company threatened reprisals against stewards because it believed that they were too active in pressing grievances, and offered a promotion to a chief steward if he would stop processing grievances (Supp. J.A. 2351, J.A. 49–50; 825–826, 833–835).

Company President Herbert Kohler testified at the Board hearing that from the time the Union came into

the plant, it had been attempting to "take the life" of the Company and to obtain "dictatorial power"; that "from the day we signed the first contract" he believed that the Union was going to call a strike as soon as it "could drench [the employees'] minds"; and that the Company's execution of the 1953 agreement did not signify any change in his hostility to the Union (Supp. J.A. 2349; J.A. 426–445). Attorney Conger, the Company's principal negotiator, expressed like views during a grievance meeting in September 1953. At that meeting, Union Representative Burkart urged Conger to "let bygones be bygones" and try to develop a mutually beneficial relationship (J.A. 455). When Burkart then likened the relationship between the parties to a marriage, Conger replied, "* * * if it is, it sure as hell was a shotgun wedding" (Supp. J.A. 2348; J.A. 455).

3. THE NEGOTIATIONS IN 1954 PRIOR TO THE STRIKE OF APRIL 5

In December 1953, both parties served notice that they desired to modify the 1953 contract, due to expire on February 28, 1954 (J.A. 15; 2030–2031). In January the parties exchanged contract proposals (J.A. 15; 2034–2035, Supp. J.A. 2438–2489). The Union sought, *inter alia,* a general wage increase and an "adjustment of all existing [wage] inequities" (J.A. 2034–2035). The Company, however, offered no wage increase or other new benefits, while proposing contract terms designed to reduce nonmonetary benefits significantly (Supp. J.A. 2352–2353, J.A. 157–158, 168–169; 530, 534, 578–579, 662). Thus, the Company's proposal deleted the provision in the 1953

contract calling for joint study and settlement of the wage inequities problem, and removed from the scope of the arbitration clause grievances involving discharges, incentive pay standards, day work pay standards, incentive rates, merit increases, and changes in working schedules (Supp. J.A. 2352–2353; 2436, 2442, 2446, 2455, 2472, 2480, 2486–2487). Moreover, during the subsequent negotiations (pp. 9–12, *infra*) the Company also insisted on excluding from the scope of the arbitration clause questions pertaining to inequitable shop rules and compliance with the contract provisions regarding job transfers and observance of seniority in effecting layoffs (J.A. 15–16; 463, 1241, Supp. J.A. 2386, 2490–2491).

Negotiating sessions began on February 2, 1954, and were held from time to time until early August 1955; at the close of the Board hearing, in April 1956, no agreement had yet been reached. Company Negotiator Conger devoted considerable time to vituperative attacks on unions in general and the Union in particular, especially when the Union sought to discuss particular contract issues (Supp. J.A. 2352; J.A. 576–577, 459–460, 892–894, 895, 908–909). Company representatives dissipated further time by issuing ultimata asserting that the Company's position was "fixed" or "final," and by insisting that the negotiations were futile and "a waste of time" (Supp. J.A. 2352; J.A. 470–471, 613–614, 648–649, 654, 791, 1401, 1407, 1548, 1574, 1590, 1592, 2071–2074). The Company resisted, on grounds of "principle," the Union's repeatedly scaled-down union-security proposals (J.A. 164–168; 670–671, 678–679, 688–689, 760–

762, 1539–1541, 1553, 1557, 1570–1571). However, when the Union pointed out that the Company had offered to sign a union-security agreement with the KWA, Company Negotiator Howe declared that he "wasn't taking a principle position," but that an organization without a union shop was "weaker" and "easier * * * to deal with" (J.A. 524, 603, 1540–1541).

On February 23 the Union proposed that the 1953 contract be extended for one month (Supp. J.A. 2353, J.A. 16; 461–462). On February 25 the Company rejected the Union's proposal, offering instead to extend the existing contract for one year without a wage increase (Supp. J.A. 2353–2354; J.A. 465, 2038–2039). On the following day the Company tendered the Union the alternative of a 3-cent wage increase, conditioned on the Union's acceptance of the Company's other outstanding demands, including the deletion of the provision for negotiations on wage inequities and the limitations on the scope of the arbitration clause (Supp. J.A. 2353–2354; J.A. 2040). Throughout the subsequent negotiations the Company insisted on the Union's acceptance of one or the other of these two "packages" (Supp. J.A. 2354; J.A. 31, 33–34, 168–169, 171–173, 176; 476–477, 508–509, 531, 544, 662, 668, 1269–1271, 1297–1298, 1399, 1582, 1589, 1846–1847, 2071–2072, 2153, 2159–2162).

On February 28 Union negotiators advised a Union meeting attended by about 2,000 employees that the "Company wasn't bargaining in any better faith to arrive at the terms of a new agreement than they had under the old agreement on grievances during the past year," and that unless the Union negotiators had the

strike weapon at their disposal, the Company would not negotiate a new contract (J.A. 480–482, 603). The membership thereupon authorized a strike vote, and rejected, with only one dissent, the Company's proposals of February 25 and 26 (J.A. 483). On March 14 the Union held another membership meeting, also attended by some 2,000 employees, at which Union officials again asserted that "the Company * * * would not bargain sincerely unless the membership approved the strike vote." The membership voted by an 88 percent majority to reject the Company's proposals and to authorize the Union's executive board to call a strike (J.A. 17; 484–485, 646).

On March 15 the Company began elaborate strike preparations. It once more erected watch towers at various points atop the Kohler buildings, and outside of these towers installed large swivel-mounted floodlights (J.A. 1063–1064). It stockpiled coal, procured a 10 to 14 day supply of food for 300 persons, and readied its cot inventory for use (J.A. 20; 1062–1063, 1066). The Union, too, renewed its strike preparations, setting up soup kitchens, rest room facilities, and sound trucks (J.A. 17).

Following an 11-day break in the discussions, the parties met again in early April (J.A. 17; 2189). The Union expressed willingness to compromise on specific major issues, but Conger replied that "as far as they were concerned there wasn't any more * * * they had made this clear on several occasions, and they were making it clear again" (J.A. 647–654). The Union accused the Company of bargaining in bad faith, without any desire to reach an agreement, in

order to force the Union to strike (J.A. 651–652). At the moment of break-off, Company negotiators remarked that they had seen the strike coming for a long time, and that if the parties had to have a showdown, "it might as well come now" (J.A. 18, 140; 475, 615–617, 652–653, 791, 1372, 1549–1550, 1575, 1592–1593). The strike began on Monday morning, April 5, 1965 (J.A. 18; 475).

4. THE PERIOD FROM APRIL 5 TO MAY 28, 1954

From April 5 to May 28, except for three days early in May, the plant was shut down. There was mass picketing by up to 2,500 pickets. Violence erupted in many instances, and the Union engaged in so-called "belly-to-back" picketing, with roving patrols, which prevented non-strikers from entering the plant. (J.A. 65–66, 242–243.) This type of picketing ceased on May 28, pursuant to an order of the Wisconsin Employment Relations Board,[5] and the parties agreed to resume negotiations as of June 1, when the plant reopened (J.A. 182–187).

5. THE BARGAINING SUBSEQUENT TO JUNE 1, 1954

On or about June 1, 1954, just as the parties were returning to the bargaining table, the Company, while purporting to maintain the terms of the expired contract, unilaterally and without notice to the Union instituted a 3-cent wage increase (effective as of April 5) (J.A. 31, 171; 419–420, 751, 753, 878, 1123–1124, 1557–1558). At no time either prior to or after this unilateral wage increase did the Company offer to execute a contract incorporating the terms and

[5] See *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266.

conditions of employment which it had thus put into effect—namely, a renewal of the old contract with a 3-cent hourly increase (Supp. J.A. 2354; J.A. 31, 33–34, 168–169, 171–173, 176; 476–477, 508–509, 531, 544, 662, 668, 1269–1271, 1297–1298, 1399, 1582, 1589, 1846–1847, 2071–2072, 2153, 2159–2162).

The parties met for a while, but the talks broke off in mid-August.[6] They were resumed in early September at the urging of Judge Murphy, a State court judge (J.A. 192; 735–756, 956–959, 2189). At one of these meetings, a federal conciliator observed that acceptance by the Union at this time of the 3-cent wage increase which Kohler had previously put into effect unilaterally "would amount to complete capitulation" (J.A. 193; 972). Company Negotiator Conger agreed, and then declared "that their offer was their best offer, and their last offer * * * that there had been a bitter strike in 1934; that it resulted in twenty years of labor peace, and that he was going to insist that this strike bring to the Company twenty years of labor peace" (J.A. 193; 972–973). Conger added,

[6] One of the topics discussed in the renewed negotiations was the disposition of temporary employees in a Shell Department which had been making munitions for the government under a contract that was about to expire. On July 1, the Company discharged the 53 Shell Department employees who were on strike, and transferred to other departments the 29 Shell Department employees who were working. In its prior discussions with the Union, the Company had never indicated that it contemplated such disparate treatment for the Shell Department employees. Later, the Company unilaterally decided to rehire the employees in the Shell Department who had been on strike, but accorded them even less seniority than that accorded new employees. (J.A. 176–179; 499–503, 584–586, 619–620, 632–634, 866–870, 1551–1552.)

"We are going to teach the Union a lesson" (J.A. 193; 972–973).

After meeting separately with Union and Company representatives, Judge Murphy indicated to the Company that all other outstanding issues could be dropped, and the strike settled, by a 7-cent or a 5-cent increase, which included the 3 cents previously granted (J.A. 194–196; 974, 982, 2227–2228). Although Conger had previously advised Judge Murphy that the door was not closed on the question of increases, he now flatly refused any further increases (J.A. 169, 193–194; 966–969, 2226–2228).

Between the end of September 1954 and August 1955, the Company and the Union met on several occasions, but these meetings were no more fruitful than before.[7] In early August 1955, the Company, unilaterally and without prior notice to the Union, put into effect a wage increase of 5 cents an hour (J.A. 46, 211–212, Supp. J.A. 2339–2340).

6. OTHER COMPANY CONDUCT DURING THE STRIKE

Beginning in April 1954, the Company retained the services of certain detective agencies, chiefly the Madson Detective Agency (J.A. 386–388; 1898–1899,

---

[7] During hearings before the Senate Subcommittee on Labor and Public Welfare in June 1955, Company Attorney Howe complained that, in discussing contract terms, the Union had failed to mention the Universal Rundle Corporation, a Kohler competitor with whom the UAW–CIO had recently signed a contract "incorporat[ing] practically what we have offered the union and they have refused for a year to take" (J.A. 207–208; 2138). When Union Representative Kitzman then offered to sign the same agreement with the Company, it refused (J.A. 207–208; 2139–2141).

1911–1914, 2248–2256). The Company, through Madson, engaged in an extensive program of surveillance and anti-union espionage (J.A. 388–390; 1899–1900, 1914, 2248–2249, 2293–2317). Madson suggested to the Company the possibility of "bugging" a hotel where union representatives and Board trial counsel were lodged during the hearing in this case with a device capable of monitoring conversations anywhere in the building (J.A. 61, 64, 390–391; 1903–1905, 1907–1910, 2296–2304). Another Madson report to the Company detailed a proposal for a system of secret informants in the plant who were to report on "any labor movement, infiltration, or problem" (J.A. 61, 391; 2304–2307). The detectives also investigated the private life of a Board counsel assigned to the case (J.A. 62–63; 2292–2293, 1903–1905, 2166–2167).

In late June 1954, one of the Company's foremen attempted to persuade a highly skilled worker, Forstner, to abandon the strike by promising him various special benefits and by urging his wife to use her influence to secure her husband's return to work (J.A. 47–49, 218–219, 224–225; 922–927). During December 1954 and early January 1955 the Company evicted various strikers from their Company-owned living quarters because of their participation in the strike (J.A. 52, 233–234, Supp. J.A. 2319).

7. THE DISCHARGE OF THE STRIKERS

Although mass picketing by striking employees barred ingress to the plant from April 5 through May 28, 1954 (p. 12, *supra*), the subsequent picketing

did not have that effect. During the month of August 1954, however, a series of demonstrations occurred around the homes of various non-strikers. Only a small percentage of those present were strikers; the groups were made up mainly of neighbors, passers-by, and sympathizers with the Union. During December 1954 and January 1955, groups of pickets patrolled in front of the Company's employment office. Generally, these groups attempted to impede the entrance of job applicants into the office. (J.A. 65–66, 69–70, 242–243, 246–250.)

During the meetings with Judge Murphy in September 1954, the Company first indicated that it was going to discharge certain striking employees for misconduct. On February 18, 1955, the Union wrote the Company requesting the right to negotiate concerning the strikers whom the Company would not reinstate. On March 1, 1955, the Company notified 91 strikers that because of their strike misconduct they would not be reinstated. That same day the Company wrote the Union informing it of the action taken. At no time did the Company comply with the Union's demand to bargain over the discharges. (J.A. 204; 435, 682–686, 1298–1299, 2110, 2112–2115.)

B. THE INITIAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its original decision, the Board found that the Company had refused to bargain in good faith with the Union on and after June 1, 1954, in violation of Sections 8(a) (5) and (1) of the Act, by unilaterally putting wage increases into effect; by discharging the

striking Shell Department employees and transferring the non-striking employees in that department without notification to or consultation with the Union; by delaying and refusing to furnish pertinent wage information for purposes of bargaining; by refusing to negotiate with the Union with respect to the identity of employees whom the Company considered ineligible for reinstatement upon termination of the strike; and by otherwise failing to meet its statutory obligation to bargain in good faith (J.A. 23–24, 26, 28–32, 41, 43, 46, 73–74, 151–156, 179–182, 199–200, 203). The Board also found that the Company had violated Sections 8(a) (3) and (1) by discriminating against the Shell Department employees and discharging Alex Dottei (one of the strikers discharged in March 1955) because of their participation in strike activities (J.A. 40–41, 73, n. 69, 179–182). Finally, the Board found that the Company had interfered with, restrained, and coerced its employees, in violation of Section 8(a)(1), by engaging in surveillance and anti-union espionage, by evicting certain strikers from Company-owned dwellings, by seeking to discourage Union stewards from processing employee grievances, and by certain other conduct (J.A. 40–41, 42, 47–51, 52, 61, 218–219, 224–225, 232, 233–234, 392–393).

The Board (one Member dissenting) further found that, in the negotiations preceding the strike which began on April 5, 1954, there had been no generalized refusal to bargain on the Company's part (J.A. 13,

18–20, 29–30, 138–139, 144–147).[8] The Board concluded, therefore, that the strike had been caused not by unfair labor practices but by the failure of the parties to agree on a contract, but that the strike had been prolonged, and thereby converted into an unfair labor practice strike, by the violations of the Act committed by the Company on and after June 1, 1954 (J.A. 38–41, 43, 46, 62, 361, 391–392).

Since the strike had been converted into an unfair labor strike, all strikers not replaced as of June 1, 1954, were entitled upon application to be reinstated to their former positions unless they had engaged in such misconduct as would disqualify them from reinstatement. The Board found that, of the 78 strikers named in the complaint who were discharged in March 1955, all but 1 (Dottei, *supra*) had engaged in activities serious enough to disqualify them for reinstatement (J.A. 69, 73).

The Board ordered the Company to cease and desist from the unfair labor practices found; to bargain in good faith with the Union; to offer the strikers, upon application, reinstatement to their former or substantially equivalent positions (except the 77 who the Board found had been lawfully discharged for misconduct), dismissing, if necessary, any replacements hired after June 1, 1954; and to reimburse the strikers entitled to reinstatement for any lost wages (J.A. 78–83).

---

[8] The Board found one instance of refusal to bargain preceding the strike, *viz*, the refusal to furnish information relating to the brass die casting department (pp. 6–7, *supra*); it concluded, however, that this refusal had been unrelated to the contract negotiations (J.A. 29).

The court of appeals (Judge Miller dissenting) held that the Board's findings of unfair labor practices were "amply supported by the record considered as a whole," and enforced the Board's order designed to remedy these practices (Supp. J.A. 2319–2320, 2330–2331).[9] However, the court remanded the case to the Board for further consideration of the Board's finding that the strike had not been caused by unfair labor practices and that 77 strikers had disqualified themselves for reinstatement (Supp. J.A. 2331).[10] The court concluded that the Board, in finding that the strike had not been an unfair labor practice strike at its inception, had "improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954" (Supp. J.A. 2328). The court further concluded that the Board had erred in failing to weigh the misconduct of the 77 strikers against the Company's antecedent unfair labor practices, in determining whether their misconduct was sufficient to disqualify them for reinstatement (Supp. J.A. 2320, 2322–2327).

C. THE SUPPLEMENTAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

Upon further review of the evidence with respect to the cause of the strike, the Board (one Member

---

[9] The Company filed a petition for certiorari with respect to, *inter alia*, this portion of the court's decision. The Court denied this petition. 370 U.S. 911. The Company does not now challenge the propriety of the unfair labor practice findings sustained by the court of appeals.

[10] The Union had filed a petition to review challenging these findings.

dissenting) concluded that the strike had been caused by the Company's failure to bargain in good faith and therefore had been an unfair labor practice strike from its inception (Supp. J.A. 2342–2354). The Board then evaluated the misconduct of each of the 77 discharged strikers in the light of the Company's unfair labor practices. The Board (one Member dissenting) concluded that the policies of the Act would best be effectuated by the reinstatement of those employees whose misconduct was limited to participation in the mass picketing of the plant between April 5 and May 28, 1954; in the operation of the related pass system during that time; in demonstrations before the homes of nonstrikers during August 1954; and in picketing of the employment office during December 1954 and January 1955 (Supp. J.A. 2355–2359).[11] Similarly, the Board concluded that certain other misconduct, such as bumping, shoving, shouldering, and verbal harassment of nonstrikers, and the temporary detention of certain trucks and railroad cars leaving the Company's premises, was not in the circumstances so serious as to bar the reinstatement of those participating (Supp. J.A. 2359–2361). However, the Board decided to withhold reinstatement from those strikers who had either engaged in violent physical assaults on nonstrikers or threatened the families of nonstrikers (Supp. J.A. 2361–2366).

Supplementing the remedial portions of the prior order, which had been enforced by the court of ap-

[11] The Trial Examiner's account of these activities is found in the record as follows: mass picketing at J.A. 242–243; home demonstrations at J.A. 249–250; employment office picketing at J.A. 251, 255.

peals, the Board ordered the Company to offer full reinstatement not only to those strikers replaced after June 1, 1954, but also to those replaced prior to that date. In addition, the Board ordered the Company to offer full reinstatement to the 57 discharged strikers whose reinstatement the Board had determined would effectuate the policies of the Act.[12] Finally, the Board ordered the Company to make both groups of strikers whole for any loss of pay they may have suffered as a result of the Company's failure to reinstate them on and after January 26, 1962, the date of the court of appeals' first decision (Supp. J.A. 2368).

The court of appeals (Judge Miller dissenting) enforced the Board's supplemental order in full. The court stated: "The Board properly applied the principles announced in our initial decision, and its determinations are supported by substantial evidence on the record viewed as a whole" (Pet. 39).

ARGUMENT

1. The principal question presented is the validity of the *Thayer* principle, announced in Judge Magruder's celebrated opinion in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883. That principle, we submit, is correct as a matter of law and eminently sound and practical. In the years since the *Thayer* decision the contours of the principle have become relatively well

[12] 77 strikers were covered in the remand order; 3 of these died during the course of the Board proceedings; and 17 were found by the Board to have engaged in disqualifying misconduct.

defined. Its validity has not been questioned in any circuit.[13] Accordingly, there is even less reason for the Court to review the *Thayer* principle at this time than there was when *Thayer* itself was decided, and this Court denied certiorari.

When an unfair labor practice is found, the Board is required to enter a remedial order that "will effectuate the policies of" the Act (§ 10(c)). To this end the Board is expressly authorized in the same section to order "reinstatement of employees". *Thayer* held that the Board may order the reinstatement of employees even though they were not discharged for engaging in an activity affirmatively protected by section 7 of the Act, if such an order is necessary to remedy an unfair labor practice found by the Board to have been committed by the employer, and if the discharge of the employees was not for cause. The result is that even though some employees may have engaged in misconduct and thereby forfeited the affirmative protections of section 7, the Board may, in appropriate circumstances, order their reinstatement as part of the remedy for the employer's unfair labor practice.

Such a provision is often necessary for the remedy to be adequate. If the employer's unfair labor prac-

---

[13] *Thayer* has been followed in *National Labor Relations Board* v. *Puerto Rico Rayon Mills*, 293 F. 2d 941, 947 (C.A. 1), and *Kohler Co.* v. *National Labor Relations Board*, 300 F. 2d 699, 703–704 (C.A.D.C.). See also, *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 484 (C.A. 3); *National Labor Relations Board* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871. The decisions relied on by petitioner to demonstrate a conflict among the Circuits are clearly distinguishable. See nn. 14–15, pp. 23–24, *infra*.

tice was so aggravated as to provoke the employees' misconduct which led to their discharge, reinstatement may be required to restore the *status quo ante* the unfair labor practice. It may also be the only remedy that can prevent the employer from severely debilitating the union and thereby enjoying the very fruits of his illegal conduct. A striking example is provided by the present case, in which, if the discharges are upheld, the local union involved will lose every one of the thirteen strike leaders, constituting the bulk of the union's leadership. Nor would an order reinstating such employees have the effect of condoning misconduct. Numerous sanctions, including union unfair labor practice proceedings by the Board, may be available with respect to the employees' misconduct.

Nothing in the Act prevents the Board from exercising its broad and flexible remedial powers in this fashion.[14] It is true that the Board may not order

[14] To be sure, the Board's discretion in ordering reinstatement of employees who have engaged in misconduct is not absolute. If the employee misconduct is much graver than the employer misconduct, such an order is improper. See *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (sit-down strike); *National Labor Relations Board* v. *Longview Furniture Co.*, 206 F. 2d 274 (C.A. 4) (criminal assault). The Board plainly did not abuse its discretion in concluding in the present case (see Supp. J.A. 2355–2366) that Kohler's blatant, long-continued, and highly provocative misconduct far outweighed in gravity its employees' misconduct (mass picketing, demonstrations, bumping, shoving and shouldering, etc. (see pp. 12, 20, *supra*)), and that application of the *Thayer* principle was necessary to provide a complete remedy for Kohler's unfair labor practices; the Board denied reinstatement to those employees who had made either violent physical

reinstatement of employees discharged "for cause" (§ 10(c)). But it is a question of fact in every case whether the discharge of employees who engaged in some misconduct by an employer guilty of an unfair labor practice was "for cause". If the employer's illegal conduct set in motion the train of events leading to the employees' discharge for misconduct—as the Board found in the present case—then the basic cause of the discharge is not the employees' but the employer's wrongdoing. Such a discharge is surely not "for cause" within the statutory intent. "What is *cause* in one situation may not be in another." *National Labor Relations Board* v. *Thayer Co., supra,* at 753, n. 6 (emphasis in original).[15]

---

assaults on, or threatened the families of, nonstrikers. In any event, the question whether the *Thayer* principle—assuming it is valid—was correctly applied to the particular facts of this case is not of such general importance as to warrant review by this Court.

[15] The decisions relied on by petitioner to show the contrary are inapposite. They involved either no employer unfair labor practice at all, in which event the Board would have no jurisdiction to issue a reinstatement order, or no employer unfair labor practice that could be said to have provoked the employee misconduct. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 237 F. 2d 545 (C.A.D.C.); *National Labor Relations Board* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (C.A. 8); *National Labor Relations Board* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457 (C.A. 2); *W. T. Rawleigh Co.* v. *National Labor Relations Board*, 190 F. 2d 832 (C.A. 7). In *National Labor Relations Board* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (C.A. 3), also cited by petitioner, no contention was made by the Board or the union that reinstatement was required or supported by the *Thayer* principle. The only contention was that the employer had condoned the employees' misconduct, a contention wholly unrelated to the *Thayer* principle.

2. Petitioner also contends that the court of appeals exceeded its reviewing function in remanding the case to the Board for reconsideration of the question whether the strike had been an unfair labor practice strike from its inception. In its initial decision, the Board, in concluding that there had been no generalized refusal to bargain prior to the strike in April 1954, and that consequently the strike had not been caused by unfair labor practices, had given little weight to the Company's pre-1953 attempts to prevent an independent union from gaining a foothold. The Board's reasoning was that the Company's action in signing a contract with the Union in 1953 neutralized the past history (J.A. 11–20, 29–30). The court of appeals held that the Board had erred in discounting the pre-1953 history merely because of the 1953 contract with the Union. It noted that the Company subsequently committed three unfair labor practices designed to frustrate the operation of the grievance procedure established by the contract, conduct which, when viewed against the background of the Company's long-continued and adamant opposition to the union, cast the gravest doubt on the Company's good faith in the negotiations preceding the strike (Supp. J.A. 2327–2330). The court accordingly remanded the case to the Board for reconsideration of this question. The Board accepted the remand, reexamined the record in the light of the court of appeals' opinion, and concluded that the Company had in fact refused to bargain in good faith prior to the strike and that this unfair labor practice had been a cause of the strike (Supp. J.A. 2342–2354).

It is the duty of a reviewing court to determine whether the findings of the Board are supported by substantial evidence on the record considered as a whole, and if they are not, to set aside the Board's order. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. The record in the present case (see pp. 3–16, *supra*) clearly justified the court of appeals in setting aside the Board's original order on the ground that the Board had given undue weight to the Company's action in signing the 1953 contract. At all events the question whether the court correctly applied the *Universal Camera* principle to the facts of this case does not have sufficient general importance to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
NANCY M. SHERMAN,
Attorney,
National Labor Relations Board.

AUGUST 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 7 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER, KOHLER CO.

LYMAN C. CONGER
EDWARD J. HAMMER
Kohler, Wisconsin

E. RILEY CASEY
COUNIHAN, CASEY & LOOMIS
1000 Connecticut Avenue
Washington 36, D. C.
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
THE BOARD CONCEDES THE UNION'S UNLAWFUL CONDUCT	1
THE BOARD OVERREACHED IN FINDING A REFUSAL TO BARGAIN	2
BOARD'S MISSTATEMENT OF COMPANY POSITION	4
THE BOARD'S FURTHER OVERREACHING	5
THE ALLEGED BAD FAITH ADMINISTRATION OF THE CONTRACT	7
CASES DISTORTED BY THE BOARD	9
CONCLUSION	12

AUTHORITIES CITED

CASES:

American Shipbuilding Corp. v. N.L.R.B., 85 S. Ct. 955	12
Armco Steel Corp. v. N.L.R.B., 344 F. 2d 621 (6th Cir.)	3
International Ladies Garment Workers Union v. N.L.R.B., 237 F. 2d 545 (D.C. Cir.)	10, 11
John Wiley & Sons v. Livingston, 376 U.S. 543	8
N.L.R.B. v. American Insurance Co., 343 U.S. 395	3
N.L.R.B. v. Blades Mfg. Corp., 344 F. 2d 998 (8th Cir.)	11
N.L.R.B. v. Clearfield Cheese Co., 213 F. 2d 70 (3d Cir.)	11
N.L.R.B. v. Ford Radio & Mica Corp., 258 F. 2d 457 (2d Cir.)	4, 11
N.L.R.B. v. Insurance Agents Int'l. Union, 361 U.S. 477	3
N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F. 2d 941 (1st Cir.)	9
N.L.R.B. v. Wallick, 198 F. 2d 477 (3d Cir.)	9
N.L.R.B. v. Wichita Television Corp., 277 F. 2d 579 (10th Cir.)	10
Republic Steel Corp. v. Charlie Maddox, 85 S. Ct. 614	8
Steel Workers v. American Manufacturing Co., 363 U.S. 564	8

Page

Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 8
Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574 8
U.A.W. v. Wisconsin Employment Relations Board, 351 U.S. 266 2
W. T. Rawleigh Co. v. N.L.R.B., 190 F. 2d 832 (7th Cir.) 11

STATUTES:

National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, et seq.) Section 8 (d) 3

MISCELLANEOUS:

House Conference Report No. 510 (H.R. 3020), 80th Congress, 1st Session 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

---

REPLY BRIEF FOR THE PETITIONER, KOHLER CO.

THE BOARD CONCEDES THE UNION'S UNLAWFUL CONDUCT

The Board concedes, (Brief p. 12), the Company's position that the Union engaged in "belly-to-back" mass picketing, attended by violence, which prevented non-strikers from entering the plant and kept the plant shut down from April 5 to May 28, except for 3

days; and that it continued this unlawful and violent conduct until restrained by an order of the Wisconsin Employment Relations Board.[1]

Thus this case presents no factual question as to the Union's unlawful conduct or its nature.

With respect to the Company's conduct, the Board's brief deals only in invective and not in facts.

THE BOARD OVERREACHED IN FINDING A REFUSAL TO BARGAIN

The Board's brief (p. 10) states "Throughout the subsequent negotiations the Company insisted on the Union's acceptance of one or the other of these two 'packages' ".

The Board's conclusion that the Company's alleged insistence on acceptance of one or the other of its alternative proposals was a refusal to bargain is erroneous as a matter of law. Furthermore it has no factual basis. It ignores the Trial Examiner's finding, based on the evidence and summaries of negotiations of the Union's chief negotiator, that during the period June 1 to 25, 1954, the Company did make important concessions on the major issues. (128 NLRB at 1170; J.A. 187-188)

The Board concedes that the Company at all times had on the bargaining table, not merely one, but two

---

[1] The order of the Wisconsin Employment Relations Board was sustained in *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266.

The Board's present decision holds that conduct which this Court has held may properly be enjoined is nevertheless permissible and is to be condoned and rewarded by reinstatement with back pay.

alternate proposals, either of which it was willing to execute as a contract.

It is clear beyond argument that:

1. The Company was not refusing to enter into a contract but was at all times willing to enter into either of two alternative contracts.

2. The Board has here arrogated to itself a power forbidden to it by the statute and the decisions of the courts, i.e., that of sitting in judgment on the substantive terms of the contract. *Act* Sec. 8(d), 29 USC § 158(d), *N.L.R.B.* v. *American Insurance Co.*, 343 US 395, 404; *N.L.R.B.* v. *Insurance Agents Int'l. Union*, 361 US 477, 486; *Armco Steel Corp.* v. *N.L.R.B.*, 344 F. 2d 621, 624 (6th Cir.)

The Board, both in its decision and in its brief, engages in a lengthy critique of the Company's bargaining *proposals*, a power repeatedly forbidden to it.[2]

---

[2] The Board's critique of the bargaining proposals is patently erroneous in respects too numerous to deal with seriatim.

The following are illustrative:

The Company is accused of seeking to reduce non-monetary benefits (Supp. J.A. 2353), ignoring the undisputed fact that one of the Company's alternative proposals was to renew the old contract for one year *without change*.

Similarly the Company is accused of seeking to withdraw a "prior commitment" to consider the determinations of the arbitrator as to his jurisdiction or arbitratibility (Supp. J.A. 2353, n. 14). This ignores the finding of its own Trial Examiner that the former contract contained a provision for "judicial challenge in the event of a dispute concerning either the jurisdiction of an arbitrator or whether a grievance was arbitrable" hence contained no such "prior commitment". (128 NLRB at 1159; J.A. 161; See also Supp. J.A. 2396 for the contractual provision for such "judicial challenge").

BOARD'S MISSTATEMENT OF COMPANY POSITION

The statement in the Board's brief (p. 19, n. 9) that "The Company does not now challenge the propriety of the unfair labor practice findings sustained by the Court of Appeals" is totally unwarranted. The finding that the strike was an unfair labor practice strike or due to a refusal to bargain is clearly challenged on pages 5 and 10 of our petition.

We do emphatically challenge the propriety of any finding that the Company was refusing to bargain when it was making, not one but two complete contract proposals, particularly where, as here, its positions on the bargaining demands of the Union were, as found by both the Trial Examiner and the Board itself, "supported by legitimate and, in the main, reasonable arguments". (128 NLRB at 1069, 1153; J.A. 19, 146).

We also challenge the propriety of any finding that the strike was caused or prolonged for a reason *never even mentioned by the Union,* i.e., the 3¢ per hour wage increase. The Board completely ignored the *Union's own statement* of its reasons for striking and continuing its strike, i.e., because its economic demands had not been satisfied. (J.A. 2203-2205).

Thus the Board found the strike due to reasons different than the reasons understood by *both* the Union and the Company. Here as in *N.L.R.B.* v. *Ford Radio & Mica Corp.,* 258 F. 2d 457, 464 (2d Cir.), the Company is held guilty of an unfair labor practice on the ground that it was later outguessed by the Board in divining the true purpose of the strike. Not only this, but in the instant case the Board seeks to outguess even the Union as to the real reason for the strike. In *Ford Radio & Mica Corp.* the Court condemmed placing the employer in the position of having to guess at his

peril the purpose behind the strike. Under the Board's decision in the instant case the Company was placed in the position of having to guess at its peril an alleged purpose of the strike, not merely unannounced, but different from the purposes announced by the Union.

THE BOARD'S FURTHER OVERREACHING

Seldom, if ever, in a single case, has there been such an overreaching of its powers by the Board. It assumes authority:

1. To overrule the findings and order of a predecessor Board.

The Board grounds its finding on alleged derelictions of the Company dating back to 1933, two years before the passage of the Act, and seeks to apply "present day standards" to the Company's *past* conduct. (Supp. J.A. 2343).

The Board now argues (Brief p. 3) that the KWA was in effect a "Company dominated" union and that the Company "[S]ince 1933, has consistently refused to honor its collective bargaining obligations..." (Supp. J.A. 2359)

In 1933 the same charges of company domination which the Board now argues were made, heard, and rejected by the former National Labor Relations Board (under Sec. 7-A of the National Recovery Act). The Company was directed to recognize the KWA which had won an election conducted by that Board. (128 NLRB at 1146; J.A. 130).

The Board now, 30 years later, not only reverses this decision but gives its reversal *ex post facto* application as the primary basis for a finding

that the Company "[S]ince 1933, has consistently refused to honor its collective bargaining obligations..." (Supp. J.A. 2359)

2. To set aside the results of prior elections and certifications, including its own certification.

In 1946 the KWA again won an election, conducted by the Wisconsin Employment Relations Board, and was again certified. (128 NLRB at 1146; J.A. 130).

In 1951 in an election conducted by *this very Board,* and involving this same union, the UAW, the KWA again won and *was certified.*

If the Board's present charge that the KWA was "Company dominated" had any validity it could and would have been made after the 1951 election and the election set aside.

The Board now repudiates the results of these impartially conducted elections and *its own certification* on the basis of these stale charges and grounds its finding of law violation by the Company on such *ex post facto* repudiation.

During all this period that the present Board now finds that the Company "consistently refused to honor its collective bargaining obligations" the Company was:

1. Recognizing the representative chosen by a majority of its employees.

Three times during that period the Company's employees were afforded an opportunity to and *did* exercise their "lawful rights" to choose a bargaining representative, rights now alleged

by the Board to have been held in "flagrant disregard" by the Company. (Supp. J.A. 2359, n. 20).

The Company honored its employees' choice. The Board now seeks, *nunc pro tunc,* to dishonor that choice. The Board patently misconstrues the Company's "collective bargaining obligation". That "obligation" was to recognize the union freely chosen by a *majority of its employees,* not a union favored by the *present* Board members.

2. Complying with the certifications of authorized administrative bodies—including the Board's own certification.

For the Board to term such actions by the Company a refusal to honor its collective bargaining obligations or a flagrant disregard of employee rights is sheer sophistry and the substitution of invective for fact.

THE ALLEGED BAD FAITH ADMINISTRATION OF THE CONTRACT

The Board's brief in support of its finding that the Company administered the grievance provisions of the 1953 contract in bad faith (Board brief p. 7; Supp. J.A. 2351) illustrates another arrogation of a power which the Board was expressly denied by Congress.

Congress considered making contract violations an unfair labor practice but rejected that proposal, saying—

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (House Conference Report No. 510, 80th Cong. 1st Session

p. 42; Legislative History of the Labor-Management Relations Act 1947, p. 546).

Repeated decisions of this Court have emphasized that the enforcement mechanism of the contract, i.e. arbitration, is the sole means of interpretation and enforcement of compliance with the terms of the contract. *Steel Workers* v. *American Manufacturing Co.*, 363 U.S. 564, *Steel Workers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, *Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, *Republic Steel Corp.* v. *Charlie Maddox*, 85 S. Ct. 614

The contract now alleged by the Board to have been administered in bad faith defined a "grievance" as "any difference arising out of the application or interpretation of any provision of this contract" (Supp. J.A. 2391) and gave the arbitrator "final and binding" authority over interpretation and claims of violation of the contract. (Supp. J.A. 2395).

The Union took three cases to arbitration during the life of the contract, winning two and losing one. (128 NLRB at 1159; J.A. 161).

The Board now makes the incredible assertion that, although the Union took three relatively minor matters to arbitration, it nevertheless tolerated such bad faith violations of the contract as to amount to virtual sabotage of the entire grievance procedure without *even attempting* to enforce its contractual rights by arbitration!

The Board may not under the guise of a finding of "bad faith" grant itself the power to interpret and determine compliance with a contract—a power delib-

erately denied to it by Congress and reserved by the express terms of the contract to an arbitrator.

CASES DISTORTED BY THE BOARD

The Board urges (Brief p. 22, n. 13) that its concept of a "Thayer doctrine" has been followed by other courts.

The cases cited by the Board, *with the exception of the very case now being appealed from,* (300 F. 2d 699), do not support the Board's "balancing" theory.

In *Puerto Rico Rayon Mills* the Court sustained the Board's finding that the *real* reason for the refusal to reinstate was, not the misconduct of the employees, but to discourage union membership, (*N.L.R.B.* v. *Puerto Rico Rayon Mills, Inc.,* 293 F. 2d. 941 at 948 (1st Cir.)). In other words the misconduct was found to be only a *pretext* for the refusal to reinstate.

Here the Board has specifically found that the strikers' unlawful conduct was the *real* reason for the discharges and not a pretext. (128 NLRB at 1102, n. 63; J.A. 65, n. 63).

The Court in the *Puerto Rico Rayon Mills* case did not engage in "balancing" unlawful striker conduct against alleged employer unfair labor practices.[3]

Nor does *N.L.R.B.* v. *Wallick,* 198 F. 2d 477 (3d Cir.) support any theory of "balancing" unlawful conduct against employer unfair labor practices.

---

[3] In the *Puerto Rico Rayon Mills* case (at p. 947), as to the loom fixers alleged to be supervisory employees, the Court interprets the *Thayer* case as do we, that it holds only that the Board may order reinstatement where the activity is merely "unprotected" but not unlawful.

On the contrary the Court held (p. 485) "The strike of July 5 even if *unprotected,* was in no sense *unlawful".* (emphasis supplied)

The Court clearly distinguished between conduct merely unprotected and conduct which was *unlawful.*

It specifically held, following *Fansteel,* that the policies of the Act would not be effectuated by reinstatement of strikers who engaged in violence or unlawful conduct. (p. 484)

N.L.R.B. v. *Wichita Television Corp.,* 277 F. 2d 579 (10th Cir.) likewise offers no support for any "balancing" theory. The Court, after noting that there was evidence of acts of a serious nature (p. 585) held that "[T]here was no proof that any identified striker... took part in such acts".

Here the Board concedes that the discharged strikers engaged in the unlawful conduct for which they were discharged. (Board brief p. 12; 128 NLRB at 1102, n. 63; J.A. 65, n. 63).

The cases cited in our petition cannot be distinguished on the grounds advanced by the board.

The statement (Board brief p. 24, n. 15) that the *International Ladies Garment Workers Union* v. *N.L.R.B.* case, (237 F. 2d 545 (D.C. Cir.)) involved "no employer unfair labor practice that could be said to have provoked the employee misconduct" (Board brief p. 24, n. 15) is incomprehensible.

In that case the Court (at p. 547) sustained a Board finding of unfair labor practices through interference with organizational activities.

The Board blandly tells the Court that Kohler's alleged interference with organizational activities pro-

voked unlawful conduct but that in the *International Ladies Garment Workers* case *actual* interference could not be said to "have provoked the employee misconduct".

This highlights the subjective and inconsistent nature of findings which would be made under the Board's "balancing" theory. This "balancing" theory substitutes *personal opinion* for a rule of law.

In *N.L.R.B.* v. *Clearfield Cheese co.*, 213 F. 2d 70 (3d Cir.), the Court (at p. 74) affirmed the Board's finding that the cause of the strike was the employer's refusal to bargain. The Court did not "balance" that unfair labor practice against the misconduct of strikers who barred access to the plant but held that they had forfeited their right to reinstatement. (at p. 75).

The decision is obviously inconsistent with the Board's present interpretation of *Thayer*.

N.L.R.B. v. *Blades Mfg. Corp.*, 344 F. 2d 998, 1004 (8th Cir.) and *N.L.R.B.* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457, 464 (2d Cir.) specifically interpret *Thayer* as denying the Board power to order reinstatement when the discharge was for cause.

In *W. T. Rawleigh Co.* v. *N.L.R.B.*, 190 F. 2d 832 (7th Cir.) the Board found unfair labor practices on the part of the employer.[4] The employer chose not to contest the e findings before the Court (at p. 835). The Court engaged in no "balancing" but held certain strikers barred from reinstatement by their conduct in preventing access to the plant.

---

[4] The Board, in the *Rawleigh* case, (90 NLRB 1924 at 1926) found "a pattern of illegal opposition to the purposes of the Act". This is a finding on all fours with the Board's finding in the case at bar of refusal "to honor its collective bargaining obligation". (Supp. J.A. 2359)

The Court's decision in *Rawleigh* is clearly inconsistent with the Board's present interpretation of *Thayer*.

CONCLUSION

The Board's decision in this case, if allowed to stand, establishes a rule of men not of *law*.. When an administrative board assumes to reverse decisions of prior boards, going back as far as 30 years, it is evident that its decisions are based on personal predelictions, not on law.

The "balancing" theory advocated by the Board substitutes subjective considerations for the test of law.

The anamolous results inevitably flowing from such subjective considerations is well illustrated in this case. Here the Board holds that a "threat of violence directed toward the family or a non-striker" by a single striker or a small group of strikers forfeits any right to reinstatement (Supp. J.A. 2365), but condones the much more intimidating threat to families of non-strikers by mobs of 500 to 700 (Supp. J.A. 2361).

We submit that again, as in *American Shipbuilding Corp.* v. *N.L.R.B.*, 85 S.Ct. 955, the Board's assumption or authority to define national labor policy should be reversed.

Respectfully submitted,

LYMAN C. CONGER
EDWARD J. HAMMER
Kohler, Wisconsin

E. RILEY CASEY
COUNIHAN, CASEY & LOOMIS
1000 Connecticut Avenue
Washington 36, D. C.

Attorneys for Petitioner